T. Jayre weather's

THE

LAW

OF

EJECTMENTS,

OR, A

TREATISE

SHEWING

The Nature of *EJECTIONE FIRME*, the Difference between it and Treſpaſs, and how to be brought or removed where the Lands lie in *Franchiſes*. In what Caſes this Action lies, or not. Of the Old Way of Sealing Leaſes, and of the New Practice. Of Confeſſing Leaſe, Entry and Ouſter. Of what things *Ejectione Firme* lies, or not. Of Declarations in this Action, and what Special Pleadings are now in uſe. Of Venues, Iſſue, Trial.

As alſo

Who are good Witneſſes or not in the Trial on Ejectment, and what ſhall be allowed good Evidence or not, either as to Records, or Matters in *Fait*. Where Bills, Anſwers and Depoſitions ſhall be read on a Trial or not,

Together with

The Learning of Special Verdicts at large, relating to Titles of Land and Eſtates in ſeveral Rules, and of Judgments with their ſeveral Forms of Entries in Special Caſes, and of *Habere facias poſſeſſionem*, how to be executed, and in what Caſes a new *Habere fac' poſſeſſionem* ſhall be granted. And laſtly, of Erroneous Judgments and Writs of Error; and ſeveral other Matters, all relating to Actions of Ejectments.

Very neceſſary for all Lawyers, Attornies, and other Perſons, eſpecially at the Aſſiſes, *&c.*

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THE PREFACE TO THE READER.

UPon the first View of the Title of this Treatise, I doubt not but many Persons will slight it, being upon a Topick *well known and understood (as they imagine) by even every Pretender to the Law: There's not the least Sollicitor or Attorney in any Nook of* Cornwall, *or Corner of* Cumberland, *but thinks he is privy to the whole Learning of* Ejectments. *And yet if they would take the Pains to peruse*

the enſuing Sheets, they doubtleſs may be of another Opinion, and will find very uſeful and proper Matter relating to an Action which concerns the greateſt Titles in the Kingdom, and has made ſo great a Noiſe at the Barr, and in the Circuits for Sixty Years laſt paſt.

Beſides, if there happen any material Miſtake in this Action, the Remedy is very chargeable. I remember Mr. Levett's *Caſe of the* Inner-Temple *(the Argument whereof made by a very Ingenious Profeſſor of the Law, I have herein inſerted.) The Record was an Iſſue of* Trinity *Term* 1696. *and the Demiſe is laid the* 10th *of* April 1697. Habendum *from the* 25th *day of* March *then laſt paſt; whereas the Demiſe ſhould have been laid the* 10th *of* April 1696. *And tho'* Mr. Levett *had a Verdict; yet he could not have Judgment, but was forced*

forced to a new Trial at Bar. And many more ſuch Inſtances might be given.

I ſhall not dare to deliver my Opinion concerning the Change of Real Actions into Ejectione Firme, *but I know many Grave Lawyers have grumbled at the Inconveniencies of a Man's being too obnoxious to be trickt out of Poſſeſſion.*

However, this we muſt all allow, That ſince the ſaid Alteration, the Common Law hath loſt a great Part of the Beauty and Nicety of its Pleading.

I have been large under two of the enſuing Titles; I mean that of Evidence, *and the other of* Special Verdicts; *Who ſhall be allowed as good Witneſſes, or not; and what ſhall be lookt upon as ſufficient Evidence both as to Matter of Record, or Matter* en Fait, *in this Action, is of great Uſe to be underſtood; and the*

Caſes that lay diſperſt in our Books for that purpoſe, I have reduced to ſome Method.

And as for the right and exact drawing of Special Verdicts, we all own it to be an undeniable Argument of a good Underſtanding in the Law, and of very great Conſequence, eſpecially thoſe which concern Title of Lands and Eſtates.

As for the Errata's *of the Printer, the Judicious Reader will find that they will not much interrupt the Senſe; and as for my own I humbly beg Pardon.*

THE

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THE LAW OF EJECTMENTS.

CHAP. I.

The Nature of the Action of Ejectione Firme, *and of the Change of Real Actions into Ejectments. Difference between an Action of Treſpaſs and Ejectment in Five Diverſities. Difference between* Ejectione Firme *and* Quare Ejecit infra Terminum; *in what Court this Action is to be brought or not, and of Removal by* Procedendo *into inferior Courts.*

THIS Action of *Ejectione Firme* includes in it ſelf an Action of Treſpaſs, as appears by the Beginning, Body and Concluſion of the Writ; for the Writ begins thus: *Si* A. *fecerit te ſecurum de clamore ſuo proſequendo tunc pone*, &c. and ſo begins the Writ of Treſpaſs. The Body of the Writ of *Ejectione Firme* is, *Quare*

unum Meſſuagium vi & armis fregit & intravit; and all the Addition in the *Ejectione Firme* is, *Et ipſum à firmâ ſua inde ejecit*, &c. The Concluſion of both is, *Et alia enormia ei intulit ad grave damnum*; and the Treſpaſs and Ejectment are ſo woven and intermixt together, that they cannot be ſevered; and the Entry in an *Ejectione Firme* is, *In plito' Tranſgreſſionis & Ejectionis Firme.* In 6 *R.* 2. *Tit. Eject' Firme* a. it is called an Action of Treſpaſs in its Nature. The Conſequence of this is, That in this Action, Accord with Satisfaction is a good Plea. And Accord and Satisfaction for one ſhall diſcharge all the Treſpaſſers and Ejectors; and tho' the Term (which is a Chattel Real) ſhall be recovered as well as Damages, yet it is a good Plea.

Now tho' we find few Titles of *Ejectione Firme* in our Old Books, yet it was in uſe all along; it was uſed in *Bracton*'s time, and Term and Damages were recovered therein. *In tempore H.* 3. he ſaith, *Si quis ejiciatur de uſu fructu vel habitatione alicujus tenementi quod tenuit ad terminum annorum ante terminum ſuum*, there the Leſſee ſhall have a Writ of Covenant againſt his Leſſor; and againſt his Vendee he ſhall have a *Quare Ejecit infra Terminum*; and as well againſt the Leſſor as a Stranger, an *Ejectione Firme.*

The Reaſon of the Change of Real Actions into *Ejectione Firmes.*

But this Action came to be more frequent in my Lord *Dyer*'s time, as may appear by his Complaint in Court when he was Lord Chief Juſtice of the *Common Pleas*; which alſo gives us the Reaſon of the change of Real Actions into Ejectments; *All Actions* (ſaith

(ſaith he) *almoſt which concern the Realty, are determined in the* King's Bench *by Writs of* Ejectione Firme, *whereby the Judgment is,* quod recuperet Terminum, *and by that they are ſoon put into Poſſeſſion.* And therefore in a *Formedon* it was prayed by Council that they might proceed without Eſſoyns, and feint Delays, becauſe the Plaintiff's Title appeared, which my Lord *Dyer* granted, *Becauſe* (ſaid he) *this Court is debaſed and leſſened, and the* King's Bench *doth increaſe with ſuch Actions which ſhould be ſued here,* for the ſpeed which is there: *And* (continued he) *no Action in Effect is brought here, but ſuch Actions as cannot be brought there, as* Formedons, *Writs of Dower, and the like.* And it is my Lord Chief Juſtice *Hale's* Obſervation in his Preface to *Kolls's Abridgment: The Remedy by Aſſiſes and ſeveral Forms and Proceedings relating thereunto, were great Titles in the Tear-Books; and altho' the Law is not altered in relation to them, yet Uſe and common Practice hath in a great meaſure antiquated the uſe of them by recovering Poſſeſſions, and the Remedy by* Ejectione Firme *uſed inſtead thereof.* So that rarely is any Aſſiſe brought, unleſs for recovering Poſſeſſion of Offices. And ſo of Real Actions, as Writs of Right and Writs of Entry, which are ſeldom brought, unleſs in *Wales,* by a *Quod ei deforceat.* But now the Entry of him that hath right being lawful, Men chooſe to recover their Poſſeſſions by *Ejectione Firme.* But there was a new way invented to try Titles of Land in perſonal Actions, but was not allowed, as in *Jeremy* and

Simſon's Caſe, 16 *Car.* 2. *B. R.*

It was moved for Tryal at Bar on a feigned Action on the Caſe, upon a Wager by Agreement of Parties, to have the Opinion of the Court of the Validity of a Will; but tho' the Action was laid in *Middleſex*, yet being an Innovation, and the way to ſubvert *Ejectione Firme's*, which have ſubverted the *Formedons*, and itſufficiently appearing feigned on the Record, in that the Title of Land is hereby to be tryed in perſonal Actions, it was totally denied; but had it been by direction of *Chancery*, the Court would do it, but would in no wiſe grant this.

It was ſaid by *Elleſmere* Lord Chancellor, that until the 14 *H.* 7. it was never known that a Poſſeſſion was removed by an Action of *Ejectione Firme*, and ſaid, It was great pity it was allowed at this day for Law in *England*; and therefore was of Opinion, That an Action of Treſpaſs *Quare clauſum fregit*, was much better to try the Title than an *Ejectione Firme*. 1. Becauſe no Poſſeſſion was removed by the one. 2. Becauſe a Man may ſo plead in an Action of Treſpaſs, as that he may make the Plaintiff diſcloſe his Title; whereas by his *Ejectione Firme* it is no more than *Non culp'*, and then a Trial, and ſo out of Poſſeſſion without more buſineſs, which, he ſaid, was a Pick-pocket Action. *Ex M. S.* 3 *Leon, p.* 49.

This Action is grounded on two Things, (*videlicet*) the Leaſe and the Ejectment.

It was well obſerved in *Eyres* and *Baniſter's* Caſe, *Mcor Rep.* 418. That *Ejectione Firme*

Firme in former times was not thought to be an Action which concerned the Lessor, but only the proper Interest of the Lessee; but now of late times it is put in ure by the Experience of the Judges and all others, that an *Ejectione Firme* is the Suit of the Lessor, and the Lease made only to try his Title, and to recover the Possession to him, and the Suit is prosecuted at his Charge, and his Lessee is but his Instrument to this purpose; and all this to avoid the Charge and Delay of a Real Action, and the Peril of being barred by a single Verdict. And *Partridge* and *Strainge*'s Case, *Plo.* 78. was cited for the purpose; if one being out of Possession above a year, makes a Lease for years, this is Maintenance within the *Stat.* 32 *H.* 8. and the Lessor and the Lessee shall lose the Value of the Land; but if such a Person be at this day possest of such a Lease to try the Title, and not by Contract, that the Lessee shall hold the Land, this is no Maintenance, as hath been resolved in *B. C. B. R.* and *Star-Chamber.*

But for the better understanding the nature of this Action, I shall shew wherein it differs from an Action of *Trespass* and a *Quare Ejecit infra Terminum*; for tho', as was observed before, it is in a sort a Trespass, yet it differs from it in several Things.

In *Trespass* Damages are only to be recovered, but in *Ejectione Firme* the Thing or Term it self is to be recovered as well as Damages: And from hence another difference is observable in respect of Certainty. If in *Tres-*

1. Diversity where the Damages are only recovered, and where the Term.

Treſpaſs the Plaintiff declares in one Acre, and abutts it, and the Jury find him guilty *in dimidio Acræ prædict'*, or in one Foot of it, this is good, tho' the Moiety is not bounded; they have found the Treſpaſs in the Moiety of the Acre bounded, and this ſufficeth in this Action where Damages are only to be recovered: But if it were in *Ejectione Firme* it had been ill; for it is not certain in what part the Plaintiff ſhall have his *Habere fac' poſſeſſionem.* And from this Diverſity it is, that if an *Ejectione Firme* be brought againſt two Defendants, the one confeſſeth the Action, and the other pleads in Bar, Not guilty, the Plaintiff cannot releaſe his Suit as to one of the Defendants, and proceed againſt the other; but in *Treſpaſs* in ſuch Caſe he may, becauſe this Suit is only in point of Damages. *Yelv.* 114. *Winckworth* and *Man.* 2 *Bulſtr.* 53.

2. Diverſity, Poſſeſſion a good Title in *Treſpaſs*, but not in *Ejectment*, and why.

Poſſeſſion is a good Title for the Plaintiff in *Treſpaſs*, if the Defendant hath not a better to ſhew, *aliter* in *Ejectment*; for in *Ejectione Firme* if the Plaintiff hath not a Title according to his Declaration, he cannot recover, whether the Defendant hath Title or not, as was *Cotton*'s Caſe. An Infant leaſeth Land to *C.* at will, who entred and ouſted *S.* who thereupon brought an *Ejectione Firme*, on a ſpecial Verdict no Title appeared to be in the Plaintiff, and it was objected againſt the Leaſe at will, becauſe it was made by an Infant, and no Rent reſerved upon it, nor the Leaſe made upon the Land, and therefore the Leſſee ſhould be a Diſſeiſor *Per Cur'* be the Defendant a Diſſeiſor or not,

not, its not material here, for if the Plaintiff hath not Title according to his Declaration, he cannot recover; and it is not like to *Treſpaſs*, where the very Poſſeſſion without other Title, is good. 1 *Leon*, 215. *Cotton's* Caſe.

3. Diverſity, colour not ſufficient in *Ejectione Firme*, and why.

Naked Colour is not ſufficient in *Ejectione Firme*, as it is in *Treſpaſs*; therefore if the Plaintiff make Title in *Ejectment*, this Title of the Plaintiff ought of neceſſity to be anſwered (*viz.*) either by matter of Fact, or in Law, which confeſſeth and avoideth the Title, or traverſeth it: For a naked Colour in this Action is not ſufficient, as it is in *Aſſiſe* or *Treſpaſs*, which comprehend not any Title or Conveyance in the Writ or Count, as this Action does in both; and in *Godb.* 159. in this Action a Man ſhall not give Colour, becauſe the Plaintiff ſhall be adjudged in by Title. *Dyer*, 366. *Godb.* 159. *Piggot* and *Goddet's* Caſe.

4. Coniſance of *Treſpaſs* includes not *Ejectments*.

Allowance of Coniſance of Franchiſe in *Treſpaſs*, will not warrant an *Ejectione Firme*, unleſs the Franchiſe had Conuſance of all Pleas, as was adjudged in the Caſe of the Biſhop of *Ely*, *Ter. P.* 18 *Car.* 2. *B. R.*

5.

In *Clerks* Caſe the *Venire fac'* was *ad faciend' juratam in Placito Tranſgreſſionis*, where it ſhould have been in *Placito Tranſgreſſionis & Ejectionis Firme*, and the Court would not amend it: For though *Ejectione Firme* be but a Plea of Treſpaſs in its Nature, yet the Actions are ſeveral, and therefore the *Venire fac'* ought to be accordingly. *Cr. El.* 622. *Clerk's* Caſe.

6. *Ejectione Firme* againſt two Defendants, one pleads Not guilty, the other pleads, the Plaintiff replies, and ſo Demurrer; no Judgment ſhall be given on the Demurrer, till the Iſſue be tried; for in this Action the Poſſeſſion of the Land is to be recovered, and it may be for any thing that appeareth he who pleads the General Iſſue, has Title to it; but if it had been an Action of Treſpaſs, and the Plaintiff will releaſe his Damages on the Iſſue joyned, he ſhall have Judgment againſt the other. 2 *Leon.* 199. *Drake* and *Monday*.

In Ejectment againſt two, one pleads to Iſſue, and the other demurs Iſſue firſt to be tried.

7. *Treſpaſs* is *deins Stat.* 21 *Jac.* which names *Treſpaſs* generally, but *Ejectment* is not, 1 *Keb.* 295. *Power's* Caſe.

8. The Plaintiff declares in *Treſpaſs* in one Acre, and abutts it, the Jury find him guilty *in dimidio Acre præd'*, this is good; but if it were in *Ejectione*, the Verdict had been ill; for it is not certain in what part the Plaintiff ſhall have his *Habere fac' poſſeſſionem*, *Telv.* 114.

Note. *Ejectione* and *Treſpaſs* for Battery, both one Writ.

Ejectione Firme and *Treſpaſs* of Battery were both in one Writ, and upon Not guilty, Verdict was given for the Plaintiff both for the *Ejectment* and for the *Battery*, and intire Damages. Q. of the Judgment; for the Damages for the Battery could not be releaſed, becauſe they were entire with the Ejectment, *Hob.* 249. *Bird* and *Snell*.

Ejectione Firme againſt a Baron and Feme, which are but one Perſon in Law, yet if the Baron dies, the Suit ſhall proceed againſt the Wife; for it is in the nature of a Treſpaſs, *Hardr.* 161.

Of

Of the Difference between Ejectione Firme *and* Quare ejecit infra Terminum.

Ejectione Firme lies againſt the immediate Ejector, but *Quare ejecit* lies againſt him who has Title, as againſt him in Reverſion, 7 *H.* 4. 6. b.

Ejectione Firme is *vi & armis*, the other is not.

Quare ejecit infra Terminum lies againſt him who is in by Title, as againſt the Vendee of the Leſſor, but *Ejectione Firme* is againſt him that is the wrong Doer.

In *Ejectione Firme* if the Term expire hanging the Action, this ſhall not abate the Writ, but the Plaintiff ſhall have Judgment for his Damages; *aliter* in *Quare ejecit infra Terminum.*

Note, No *Ejectione Firme* was brought againſt a Stranger before 14 *H.* 7.

At Common Law the Leſſee had no Action but of Covenant againſt his Leſſor or *Ejectione Firme.* The *Quare ejecit infra Terminum* is given by the *Stat. W.* 2. *c.* 24. for Recovery of his Term againſt the Feoffee; for *Ejectione Firme* lies not againſt him, becauſe he came to the Land by Title of Feoffment,

In what Court this Action is to be brought, or not, and of Removal by Procedendo *to an Inferiour Court.*

It lies in *B. R.* and *Banco Communi.*

It lies in the *Exchequer*, and for a Party priviledged by Bill, 1 *Rep.* 3. *Pelham's* Caſe.

In the *Exchequer.*

Note, Where the King's Revenue is concerned, the Ejectment ought to be brought in the *Exchequer*, as if a Man claims Title to Lands of a Perſon outlawed. *Ejectione Firme* was brought in the *Exchequer* by *Garroway* againſt *R. T.* upon an Ejectment of Lands in *Wales*, and it was maintainable as well as Intruſion on Lands in *Wales* upon the King himſelf.

Upon *Ejectment* brought in the Court of *Common Pleas* by the Defendant in the *Exchequer*, the Plaintiff moved that the Action might be laid in the *Exchequer*, becauſe his Title was under an Extent out of this Court for Debts in Aid; and ſo it was ordered, *Hardr. p.* 193. Sir *Ralph Banks* and Sir *Tho. Bennet. Hardr. p.* 176. *Hammond's* Caſe. *Godb.* 1. 296. *Caſe* 416.

This Action lies not in the *Marſhalſea*, 10 *Rep.* 72.

How Ejectment lies in Ancient Demeſne.

It lies in the Court of Ancient Demeſne, if it be of Ancient Demeſne Lands, and not in the King's Courts; and therefore in *Ejectione Firme* brought above, Ancient Demeſne is a good Plea. *Vid. infra Tit. Pleading.* 5 *Rep.* 105. *Alden's* Caſe.

Ejectione

Ejectione Firme depends in *B. C.* and a ſpecial Verdict is found. The Plaintiff may bring a new Ejectment in the *King's Bench*, and it ſhall not abate, for it's no Inconvenience to any Perſon, the ſame being Plaintiff here and there; but if the Verdict had been for the Defendant in the Common Bench, then the Plaintiff cannot bring a new Action in *B. R.* till Poſſeſſion be given in *Baneo Communi* according to the Verdict, *Tr.* 17 *Car.* 2. *B. R. Shepard* and *Griffith*.

After a ſpecial Verdict found in *C. B.* the Plaintiff may bring a new Ejectment in *B. R. aliter* of the Defendant.

By *Twiſden* in *Criſp* and *Jackſon*'s Caſe, the Reaſon why Ejectment will not lie of Lands in *Jamaica*, or in any of the King's Foreign Territories, was, becauſe the Courts here could not command them to do Execution there, for they have no Sheriffs, 1 *Ventr. p.* 59.

Ejectment will not lie of Land in *Jamaica*, and why.

Tr. 14 *Car.* 2. It was ordered in *B. R.* that in every Action of Treſpaſs and Ejectment to be brought after that time in the *King's Bench*, if the Land did lie in the County of *Middleſex*, then a Bill of *Middleſex* ſhould be brought; and if the Lands lay in *London*, then a Writ of *Latitat* ſhould be taken out againſt the caſual Ejector named Defendant in every ſuch Action.

How Ejectments to be brought, if the Lands lie in *Middleſex* or *London*.

If *Ejectione Firme* be removed from an Inferior Court by *Habeas Corpus* into the *King's Bench*, it is not removable by *Procedendo* to a Franchiſe, as *Oxon*, *Pole*, *Canterbury*, &c. which only hold Plea of perſonal Actions, but in this Action he ſhall recover Poſſeſſion, and have a Writ of *Habere fac' poſſeſſionem*, and thereby he that hath a Freehold

Not removable by a *Procedendo* to a Franchiſe.

hold may be put out of Poſſeſſion. And in *Sabin*'s Caſe *M.* 13 *Car.* 2. *B.* R. *Ejectione Firme* was brought in the City and County of *Canterbury*, and removed into the *King's Bench* by *Habeas Corpus*, and a *Procedendo* was prayed; but becauſe Bail was put in in *B. R.* the Court denied the *Procedendo*, becauſe they were thereby ſeiſed of the Cauſe, *Cro. Car.* 87. *Halley*'s Caſe. *M.* 13 *Car.* 2. *B.R. Sabin*'s Caſe. *Siderfin*, *p.* 231.

Procedendo denied, becauſe Bail was put in *B. R.*

Now in ſuch Caſes of Franchiſes, as *Canterbury*, *Oxon*, the *Cinque-Ports*, &c. they ſuppoſe the Leaſe elſewhere in the County, and it ſhall be tried where it's ſuppoſed the Leaſe to be made; and ſo by *Wild* in *Sabin*'s Caſe. Upon Ejectment in the County of *Canterbury* one may declare upon a Demiſe in any part of the County of *Kent*, and ſo try it at *Maidſtone*; for the *Venire* comes always from the place of the Demiſe, which was denied by *Windham*, the Body of the County being as another County from that of *Canterbury*.

To be tried where its ſuppoſed the Leaſe is made.

Canterbury.

But the reaſon why the Court denied a *Procedendo* in *Allen* and *Burney*'s Caſe, was becauſe the Plaintiff below had not actually ſealed a Leaſe, as he ought to have done, being an Inferiour Court, *M.* 18 *Car.* 2 *B. R. Allen* and *Burney*.

Action was brought in the Court of the Marches of *Wales* in nature of *Ejectione Firme*, and a Prohibition granted, becauſe they are not to meddle with the Poſſeſſions of Men, unleſs in reſpect of force, *plena Curia*, 2 *Rolls Rep.* 309.

Marches of *Wales.*

CHAP.

CHAP. II.

Who ſhall have Ejectione Firme, *and in what Caſes this Action lies, or not, in reſpect of Poſſeſſion, in reſpect of Entry congeable, in reſpect of Exility of Eſtate. By Leſſee of Copyhold, and how, and whether before Admittance, and the manner of declaring. Of Ejectment by Executors. Infant-Leſſee of Simoniſt. On* Elegit. *On undue Extent, and in caſe of holding over. By Intruder, by the King's Leſſee, by a Perſon Outlawed, by Leſſee of Bail on Extent, by Judgment againſt the Principal, by Iſſue in Tail liable to a Statute, who comes not in and pleads to the* Sc' fac', *on Entry if the Grantee of Rent with* Proviſo *for Retainer till Satisfaction of Arrears; by* Ceſty que Truſt; *by Vendee of Commiſſioners of Bankrupt.*

THE next to be handled, is, In what Caſes this Action lies, and in what not; whereby the Reader may be ſo well informed, as not to hazard his Client's Cauſe, and his own Reputation.

Note, If the Heir bring an Ejectment, and the Anceſtor dies ſubſequent to the Action, he ſhall not recover, becauſe every one ſhall recover only according to the Right which he hath at the time of the bringing his Action, in *Wedywood* and *Bayley's* Caſe, *Raym.* 463.

It

In respect of Possession.

It has been laid down for a constant Rule in our Books, That upon a Possession in Law, a Man shall never maintain an *Ejectione Firme*, but he ought to have actual Possession at the time of the Ouster, as if Tenant for years makes a Lease at will, and the Tenant at will is ejected; the Question was in *Stone* and *Grubham's* Case, 1 *Rolls Rep.* 3. if the Tenant for years for this Ejectment of his Lessee at will shall have an *Ejectione Firme*, and it was resolved that he should not. So if Lessee for years be the Remainder for years, the Lessee for years is ousted, his Term expires, he in Remainder for years cannot have an *Ejectione Firme*, because he had no actual Possession at the time of the Ejectment. So if a Lease for years be made, and before the Lessee enters, a Stranger enters, he shall not have this Action. And upon this Reason of Law it is, that by the new Rule of Practice, the Defendant shall confess Entry and Ouster; but it has been resolved, That if Inquisition upon *Elegit* be found, the Party before Entry hath the Possession, and a Fine with Nonclaim shall bar his Right; for before actual Entry he may have *Ejectione Firme* or *Trespass*, and it is not like to an *Interesse Termini*.

In *Smith* and *Rawlin's* Case no Entry was proved to be by Dean and Chapter since 1631. yet in regard Rent had been actually paid, there the Lessee may bring Ejectment (without any Lease actually sealed on the ground.) 2 *Keb.* 127. *Smith* and *Rawlins*.

Pos-

Poſſeſſion of the Leſſor of the Plaintiff muſt appear to be within Twenty years, though the ſpecial Verdict be on another Point; ſo *Keb.* 364. but 32 *H.* 8. *c.* 2. extends not to Common; but the Reverſion in the King will priviledge the Leſſor of the Plaintiff being but a Leſſee for ninety nine years againſt ſuch want of Poſſeſſion, 3 *Keb.* 681. *M.* 28 *Car.* 2. *B.* R. *Piggot* and the Lord *Salisbury*.

Leſſee for years ſhall only have this Action, *N. B.* 120. *F.*

He whoſe Entry is not congeable by Law, cannot have *Ejectione Firme*, as in caſe of a *Formedon* in Remainder and Diſcontinuance. In reſpect of Entry congeable.

Leſſor grants the Reverſion to *A.* Leſſee Attorns, *A.* ouſts him, Leſſee ſhall have *Ejectione Firme*, *N. B.* 221. *a.* 1 *H.* 5. 3. *pl.* 3.

The Action of Ejectment is maintainable, if it appear by ſpecial Verdict, that any former Leaſe made by the Leſſor *que &c.* be in force, 1 *Rep.* 153. Rector of *Chedington*'s Caſe.

How Copyholder or his Leſſee ſhall bring an Ejectment, there have been uncertain Opinions in our Books; but the Law therein ſtands thus. Ejectment by Copyholder or his Leſſee.

Leſſee of a Copyholder for one year ſhall maintain *Ejectione Firme*, in as much as his Term is warranted by the Law, by force of the general Cuſtom of the Realm; and it's but Reaſon, if he be ejected, that he ſhall have an *Ejectione Firme*; and it's a ſpeedy courſe for a Copyholder to have Poſſeſſion of the Land againſt a Stranger; but in the Guardian

dian of the Monaſtery of *Otlery's* Caſe cited, it was objected, That if Ejectment be maintainable by Leſſee of a Copyholder (as it was adjudged in *B. C.*) then if the Plaintiff recover, he ſhould have an *Habere fac' poſſeſſionem*, and then Copyholds ſhould be ordered by the Common Law, 4 *Rep.* 26. *Cr. Eliz.* 676, 717. *Erithe's* Caſe. *Moor*, 709. *Stoner* and *Gibſon. Leon. p.* 118.

4 Leon. p. 18.

By Leſſee of a Copyholder without Licence of the Lord.

The Leſſor for years of a Copyhold which is made without Licence of the Lord, may maintain an *Ejectione Firme*, becauſe he is Leſſee againſt all but the Lord; and the Leaſe is good between the Leſſor and Leſſee, and againſt all Strangers, but not againſt the Lord; and ſo in *Hardres's Rep. p.* 330. The Leaſe of a Guardian or Copyholder, will maintain the Declaration in Ejectment, though void, againſt the Lord and Infant. And therefore *Jackſon* and *Neale's* Caſe in *Cro. El.* 394. ſeems not to be Law, which was; The Licence to a Copyholder was to lett for twenty one years from *Michaelmas* laſt paſt, he makes a Leaſe for twenty one years to begin at *Chriſtmas* following, to the Plaintiff, who entred, and being ouſted by the Defendant, brings an *Ejectione Firme*; the Court was of Opinion, That the Leaſe not being warranted by this Licence, no *Ejectione Firme* lies upon it.

Declaration by Copyholder in Ejectment.

But in *Petty* and *Evans's* Caſe, in *Ejectione Firme* brought by the Leſſee of a Copyholder, it is ſufficient that a Count be general without mention of the Licence; and if the Defendant plead Not guilty, then the Defendant ought to ſhew the Licence

cence in Evidence; but if the Defendant plead ſpecially (as in thoſe times it was uſual) then the Plaintiff ought to plead the Licence certainly in the Replication, and the Time and Place when and where it was made. 2 *Brownl.* 40. *Petty* and *Evans.*

In *Ewer* and *Aſtwick*'s Caſe it was doubted by the Court (and ſo in ſeveral other Caſes in former times) Whether the Plaintiff in his Declaration ought to ſet forth the Cuſtom of the Manor that the Copyholder may Leaſe, *&c.* and then to ſhew that the Leaſe is warranted by the Cuſtom. But now it's fully agreed, That the Plaintiff ought not to ſhew that the Leaſe is warranted by the Cuſtom; but that ſhall come on the other ſide, and ſo is the Practice not to declare on the Cuſtom, *Rumney* and *Eve*'s Caſe. 1 *Leon. p.* 100.

Copyholder in his Declaration need not ſet forth the Cuſtom.

It has likewiſe been a Queſtion, Whether one ought to be admitted before he can maintain this Action; but it is reſolved in *Rumney* and *Eve*'s Caſe, if cuſtomary Lands do deſcend to the younger Son by Cuſtom, and he enters, and leaſeth it to another, who takes the Profits, and after is ejected, that he ſhall have an *Ejectione Firme*, without any Admittance of the Leſſor, or without any Preſentment that he is Heir, 1 *Leon. p.* 101. *Rumney* and *Eves*, *Pop.* 38 *Bullock* and *Dibler.*

Ejectione Firme by Copyholder before Admittance or Preſentment, and where not without Admittance.

But a Copyholder Mortgagee muſt be admitted before he bring this Action, and he may bring his Bill againſt the Lord to be

Copyholder Mortgagee muſt be admitted before he brings this Action.

admitted to inable him to try the Cuſtom; 2 *Keb.* 357. *Towell* and *Corniſh.*

By Executors. *Ejectione Firme* may be brought by Executors of Land let to their Teſtator for years upon ouſter of the Teſtator for years *per Stat.* 4 *Ed.* 4. *c.* 6. which gives an Action for Goods taken out of the Poſſeſſion of the Teſtator; the Reaſon is, becauſe it is to recover the Term it ſelf, 7 *H.* 4. 6. *b.* 2 *Ventr. p.* 30.

If a Man ouſts the Executors of his Leſſee for years of their Term, they may have a ſpecial Action on the Caſe, or they may have *Ejectione Firme* or *Treſpaſs*, 4 *Rep.* 95. *a. Reg.* 97. *N. B.* 92.

By Infant. In Ejectment the Plaintiff was an Infant at the time of the Bill purchaſed, and ſued by Attorney where he could not make an Attorney, but ought to have ſued by Guardian *per Cur'*, it's erroneous, and *Error en fait*, *Cro. Jac. p.* 5. *Rew* and *Long.*

By Symoniſt. Deprivation in the Spiritual Court for Symony, diſables from bringing Ejectment, becauſe he can make no Leaſe, *per H. Windham Buck's Lent Aſſiſes*, 1668. Dr. *Crawley's* Caſe.

The Sheriff only to deliver Seiſure on *Elegit* to enable the Plaintiff to maintain Ejectment. In *Jefferſon* and *Dawſon's* Caſe Council pray'd, That delivery of Poſſeſſion might be awarded on *Elegit*, but the Court denied it, the Party having no day to interplead; and the Sheriff ought only to deliver Seiſure to enable the Plaintiff to maintain Ejectment, and the Tenant may plead on the Ejectment, or elſe the Tenant may be turned out unheard, and ſo be remedileſs, and *per Cur'* actual Poſſeſſion ought not to be de-

delivered; but if it be, it's remediless; and yet before Entry the Plaintiff for whom the Inquisition is found, has Possession, and before actual Entry he may have *Ejectione Firme*, and is not like to an *Intereſſe Termini*, *M.* 25 *Car.* 2. *B. R.*

Ejectione Firme be for actual Entry on *Elegit.*

In some Cases Remedy against an undue Extent may be by Ejectment; as, The Inquest by Practice of the Sheriff on *Elegit*, find the Defendant had Lands in *A.* where he had nothing, and so extended all his Lands in *B.* as a Moiety, this is avoidable by Ejectment, as to a Moiety, and the Evidence may be, That the Defendant had nothing in *A.* or to file the Writ of *Elegit*, and in Ejectment thereon (which else cannot be brought) to plead the same; or in case of holding over, Ejectment lies against Tenant by *Elegit*, if he be satisfied at the extended Value, *contra* of a Judgment which is uncertain for Costs and Damages, 1 *Keb.* 891. *Dakin* and *Hulme*. 1 *Keb.* 858. Lord *Stamford* and *Hubbard.*

Remedy against undue Extent on *Elegit* by Ejectment.

Ejectment against Tenant by *Elegit* in case of holding over, not so of a Judgment, and why.

Intruder on the King's Possession, cannot make a Lease whereupon the Lessee may maintain an *Ejectione Firme*, tho' he may have an Action of Trespass against a Stranger; but a Judgment in Information of Intrusion *pro Rege* binds not a Stranger, but that he may enter and bring Ejectment; if it were otherwise this would be a Trap for any Man's Possession by lawful Title; and the Judgment on Intrusion is not in the nature of Seisin or Possession, but only *quod pars committatur & capiatur pro fine*, and an Entry may be made by the King's Patentee,

By Intruder.

Stranger may enter, notwithstanding Judgment in Information in Intrusion.

Judgment in Intrusion, what.

Hardreſs, p. 460. *Friend* and the Duke of *Richmond*.

If a Stranger entreth upon the King's Fermor, by ſuch Entry he hath gained the Eſtate for years; and if he doth make a Leaſe to another, his Leſſee may maintain *Ejectione Ferme*. A Leſſee may have *Ejectione Firme*, tho' the Reverſion be in the King. So that it ſeems the Ejector by his Entry hath gained the Land, 2 *H.* 6. 6. *Dyer* 116. *b.* 3 *Leon. p.* 206.

The Leſſee of the King.

The Leſſee of the King may bring *Ejectione Firme*, tho' the King be not put out of the Freehold by the Words, *He entred and expulſed* him, *Cr. El.* 331. *Lee* and *Morris*.

By Tenant in Common of one Moiety.

It's ſaid in *Leonard*, 1 *part* 212. Leſſee of Tenant in Common of one Moiety, without actual Ouſter, cannot maintain *Ejectione Firme* againſt the Leſſee of his Companion.

Entry taken away by lapſe of time for not entring.

J. M. covenants to ſtand ſeiſed to the uſe of himſelf for life, and after to the uſe of his Daughters, until every one of them ſucceſſive ſhall or may have levied 500 *l.* Remainder to his eldeſt Son. He had four Daughters at the time of his Death, and the Land was worth 100 *l. per Annum*; the Father died in 30 *El.* the eldeſt Son immediately entred, the eldeſt Daughter entred in 42 *Eliz.* and made the Leaſe to the Plaintiff; *Per Cur'*, ſhe hath overpaſt her time, and cannot enter; for then ſhe ſhould prejudice her other Siſters, ſo as they ſhould never levy their Portions, *Cr. El.* 809. *Blackbourn* and *Laſſells*.

A Perſon outlawed may bring *Ejectione Firme*: For tho' a Perſon outlawed cannot after an Extent, prevent or avoid the King's Title by Alienation, yet the Outlawry gives no Priviledge to the Poſſeſſion of a Diſſeiſor, but that the Diſſeiſee may enter and bring the Ejectment; for by the Outlary the King hath only a Title to the Profits, and no Intereſt in the Land, *Hadr.* 155. *Hammond's* Caſe *vide.*

By a Perſon outlawed.

If a Man ouſts the Executors of his Leſſee for years of their Term, they may have a ſpecial Action on the Caſe, or they may have an *Ejectione Firme* or *Treſpaſs*, 4 *Rep.* 95. *4. Reg.* 97. *N. B.* 92.

By Executors.

One ſeiſed of Lands in Fee-Simple, becomes Bail in an Action of Debt in *B. R.* and after Iſſue joyned, let the Land to *B.* the Plaintiff; Judgment is afterwards given againſt the Principal, and an Extent taken upon the ſaid leaſed Lands, *B.* the Plaintiff being thereupon ouſted, brings this Action of *Ejectione Firme*, *Crok. Jac.* 449. *Kervile* and *Brokeſt.*

The Bail lets Lands to *B.* Judgment is againſt the Principal, and Extent on the Lands leaſed. *B* brings Ejectment.

Tenant for life, Remainder to his Iſſue in Tail; Tenant for life enters into a Stat' and dies, Coniſee ſues a *Scire fac'* againſt his Heir, who was Iſſue in Tail, and the Sheriff retorns *Scire feci*; and upon this, Execution without any Plea pleaded by the Heir, and the Heir being ouſted by the Execution, brought *Ejectione*; *Per Cur'*, the Heir ſhall be bound by this Execution, and he has no Remedy, neither by Ejectment, Writ of Error, nor by *Aud' Querela*, nor by any other way, but againſt the Sheriff,

Where the Iſſue in Tail is liable to Execution on a *Stat.* on *Sc' fac'* retorned, and he comes not in and pleads, he ſhall not bring his Ejectment.

if he have made a *faux Retorn* of the *Scire fac'*, *Siderfin*, *p.* 55. *Day* and *Guilford*.

Upon Entry of Grantee of a Rent and Retainer till Satisfaction for Arrear, he may upon such Intereſt *quouſq;* maintain an Ejectment; and ſo the Lord upon Seiſure of a Copyhold till the Heir come to be admitted. 1 *Keb.* 287. in *Pateſon's* Caſe.

Rent granted with a Proviſo, that if it be Arrear the Grantee may enter and retain until he be ſatisfied. This Proviſo ſhall enure to grant a certain Eſtate to the Grantee when he enters for Non-payment. And tho' the Grantee by ſuch Entry cannot gain a Freehold, yet he had ſuch an Intereſt as he may make a Leaſe of it, and his Leſſee may have an Ejectment; for the Law does not give an Intereſt to any, but it alſo gives a Remedy for it; and if he have Remedy to hold ſuch Poſſeſſion, he ought to have this Action, which is the loweſt Degree of gaining Poſſeſſion. So in the Counteſs of *Cumberland's* Caſe, *Anno* 1659. of Copyholds, there was a Cuſtom, That if ſuch Tenant who claims Tenant Right, does not pay his Fine, the Lord may enter and retain the Land until he be ſatisfied, and adjudged that his Leſſee upon ſuch Entry for Non-payment, may maintain *Ejectione Firme*, *Siderfin*, *p.* 223. *Jemot* and *Cowley*. 1 *Roll.* 784. 2 *Keb.* 20. meſme Caſe. *Cro. Jac.* 511. *Havergell* and *Hare*.

Hill. 13 *Jac. B. C. Rot.* 868. *Brown* and *Hagger* cited in *Price* and *Vaughan's* Caſe, is full in the Point; and *Trin.* 14 *Car.* 2. *Roll.* 2511. *Eyer* and *Malin*. Ejectment upon a Leaſe of the Lord *Byron*, ſpecial Verdict found, Sir *J. Byron* ſeiſed in Fee by Indenture, grants a Rent-Charge for life, to commence after the Death of the Grantor; and if the Rent be Arrear, that the Grantee

tee may enter and take the Profits without Account, till the Rent and Arrears ſhall be paid. The Rent was Arrear, and the Grantee enters and makes a Leaſe to the Plaintiff; and *Bridgman* and the reſt (*præter Browne*) agreed for the Plaintiff.

By Tenant at Will.

It was ſaid in the Caſe of *Holmes* and *Bayly*, That Tenant at Will may make a Leaſe for years to try a Title of Land, and ſo may a Copyholder, *Stiles Rep.* 380.

By *Ceſty que Truſt.*

Ejectment is brought by *Ceſty que Truſt.* Now if the Truſtee of the Leaſe be Leſſor in Ejectment, he may diſclaim in *pays* (if he have not accepted the Truſt) which will avoid the Plaintiff's Title at the Tryal; 2 *Keb*, 794. *Cheek* and *Liſle.*

By a Vendee of the Commiſſioners of Bankrupts.

Vendee of the Commiſſioners on the Statute of Bankrupts of Lands by Deed Indented, cannot maintain by his Leſſee an *Ejectione Firme*, before Inrollment of the Deed, altho' it be inrolled after the Action brought: And the Difference between this and the caſe of a common Bargain and Sale *per Stat.* 27 *H.* 8. *c.* 10. of Uſes, is, For there the Eſtate paſſeth by the Contract, and the Uſe is executed by the Statute; then comes the Act of Inrolments of the ſame year, and enacts, That no Eſtate ſhall paſs without Inrolment, and this within Six Months. But the Commiſſioners here have not any Eſtate, but only a Power which ought to be executed by the Means preſcribed by the Statute, with the Circumſtances there directed, which is not only by Deed indented, but inrolled alſo; Sir *Tho. Jones*, *p.* 196. *Perry* and *Bowers.*

Note, Lessor of Tenant in Possession hath no Priviledge in Ejectment, tho' he be a Lord of Parliament, unless he be Tenant in Possession himself, 1 *Keb.* 329.

CHAP. III.

Of Process in Ejectione Firme. *The Original. What Mistakes in the Original are Error after a Verdict, or not. Of a vicious Original. Of the want of an Original. Of an Original taken out before the Cause of Action. Where Amendment shall be by the Paper-Book. Of Amendments of Originals,* Stat. 13 Car. 2. c. 11. *Of Appearance. Infant, how to appear, sue or defend. The true Difference between Guardian and* Prochein Amy. *Of want of Pledges. Of Bail. Of the* Stat. 13 Car. 2. c. 2. *Of Bail or Error.*

The Original is thus.

REX, &c. Vic' Midd' salutem. Si A. B. fecerit te securum tunc pone p' vad' & salvos pled' C. D. nuper de Londod' Gener. Ita q' sit coram Justiciariis nostr' apud Westm' (tali die) ad respondend' W. L. de Plito quare vi & armis unum Messuag' decem Acras Terre & treg. Acras Pasture cum pt'nen' in D. in Comit' tuo que S. W. vid' eid' W. dimisit ad terminum qui nondum pre-

pæteriit intravit & ipsum a Firma sua ejecit, & alia enormia ei intulit ad grave damnum ipsius W. & contra pacem nostram & Dom̃ Regis nunc, &c. T. &c.

On the Retorn in *B. R. quindena Paſche ubicunque.*

Writ, Proceſs.

In Ejectment upon a Demiſe by the Lord *L.* who was no Peer, yet upon *Non Culp'*, good, he being the ſame Perſon that did demiſe, *Allen* 58. *Bernard*'s Caſe.

So you ſee the Original Writ in *C. B.* in Ejectment, is an Attachment, or a *Pone per vadios & ſalvos plegios*, &c. and *Summonitus* in Ejectment was held to be an Error.

In *Ejectione Firme* brought by Original Writ out of *Chancery*; the Record upon the Iſſue-Roll was entred in this manner; **ſſ. Simo Edulph nuper de C. ſummonit fuit ad reſpond Tho. R. de plito quare vi & armis, &c.** And after Verdict *pro Quer'*, it was moved, That this was a Vicious Original, and not aided by any of the Statutes of *Jeofail*'s; for it appears by the Entry of it, that the Original was a Summons, where it ought to have been an Attachment, which the Court granted; but upon ſearch there was no Original filed; and then *per Cur'* ſeeing there is no Original filed, it ſhall be intended after Verdict, that once there was a good Original, which is now loſt, and that the Plaintiff's Clerk had miſtaken in the Recital of it, which

Summonit. for Attachment, is Error after Verdict.

Aliter if there be no Original.

which after Verdict is not material, *Reg. Orig.* 227. *b. Saunders Rep.* 1. *p.* 317. *Redman* and. *Edolph. Sider.* 423. meſme Caſe. 2 *Keb.* 544. meſme Caſe.

So in *Jennings* and *Downe*'s Caſe Error was aſſigned, becauſe that it appeared by the Record that the Declaration was before the Plaintiff had any Cauſe of Action; but the Council of the other ſide ſaid, There is a wrong Original certified, and prayed to have a new Certificate to have the true Original certified. *Per Cur'*, Take it, for it is in Affirmance of a Judgment, which ought to be favoured. But in *John*'s and *Steyner*'s Caſe the Original bore Date 24 *Junij* 6 *Car.* and the Ejectment is ſuppoſed 31 *Januarij*: *Per Cur'* it's Error, becauſe the Original (upon Diminution alledged) was certified as an Original in this Action, which is between the ſame Parties, and of the ſame Land, and of the ſame Term; and being taken out before the Cauſe of Action, it's a vicious Original, not aided by any Statute, *Stiles Rep.* 352. *Jennings* and *Downes. Cro. Car.* 272, 281. *Johns* and *Steyner.*

Original taken out before the Cauſe of Action, is Error.

It's a Rule in the Regiſter, That in the Writ of *Ejectione Firme* there may not be *Bona & Catalla*, becauſe that for Goods taken away a Man ſhall have an *Exigend'*, and in this Writ Diſtreſs infinite, *Plo.* 228. *b.*

So was *Johnſon* and *Davies*'s Caſe. The Suit was by Original Writ, which is of one Meſſuage, Sixty Acres of Land, Three hundred Acres of Paſture; but *per Curiam* this ſhall

ſhall not be intended the Original upon which the Plaintiff declared, but that there was another Original which warranted the Declaration, which is now imbeſilled; and this want is aided by the Statute of *Feofayls*, eſpecially as this Caſe is; becauſe the Writ is *Teſte* 18 *Apr. Ret'* 15 *Paſch.* &c. This Declaration is in *Trinity* Term, and here is no Continuance upon this Writ, *Cro. Car.* 327. *Johnſon* and *Davis.*

In *Ejectione Firme* the Paper-Book was right, *ſcil. Acram Terræ*, and the Bill upon the File was ill (*ſcilicet*) *Clauſum Terræ*; and the Bill was amended by the Paper-Book; and the Difference is, where there is a Paper-Book in the Office of the Clerk, this being right, all ſhall be amended by it; but if there were not any Paper-Book, and the Bill upon the File is ill, there can be no Amendment; and in this Caſe the Amendment was according to the Paper-Book which was in the Hands of the Plaintiff's Attorney, *Palmer*, 404, 405. *Todman* and *Ward.* Where Amendment ſhall be by the Papre-Book, or not.

It was an Exception in *Haines* and *Strowder's* Caſe, becauſe the Suit was by Original Writ, and the Clauſe (*oſtenſurus*) was not in the Writ, *Palmer*, 413. *Haines* and *Strowder. Godb.* 408. Caſe. *Crouch* and *Haines*, Caſe 488.

The Original was *Teſte* the ſame Day that the Ejectment was made, and adjudged good *per totam Curiam*, 2 *Roll. Rep.* 352, 129. *Beaumont* and *Coke.* Original *Teſte* the ſame day of Ejectment.

As

Of Amendments of Originals in this Action.

As for the Amendment of Originals in *Ejectione Firme*, there are many Cases in our Books; I shall name one or two which may be as a Guide in others.

Ex divisione for *ex dimissione* was amended; so *Barnabiam* for *Barnaham*, and so what appears to be the Default of the Cursitor, 1 *Brownl.* 130. 1 *Rolls Abr.* 198.

If the Paper-Book be perfect, tho' the Bill upon the File be not perfect, yet it's amendable after Verdict.

In *Ejectione Firme*, if the Bill be not perfect; but Spaces left for Quantity of Land and Meadow; and after the Paper-Book given to the Party, is made perfect, and the Plea-Roll and *Nisi-prius* Roll, but the Bill upon the File was never perfected; and after a Verdict is given for the Plaintiff, this Imperfection of the Bill shall be amended, because the Party is not deceived by this, forasmuch as the Paper-Book which he had, was perfect, and it was the Neglect of the Clerk not to amend the Bill when the Party had given him Information of the Quantity, 1 *Rolls Abr.* 207. *Leeson* and *West.*

Original in Ejectment was amended after Writ of Error brought, as *divisit* for *dimisit*, 2 *Ventr.* 173.

By the *Stat.* 13 *Car.* 2. *c.* 11. In all personal Actions, and in *Ejectione Firme* for Lands, *&c.* depending by Original Writ, after any Issue therein joyned, and also after any Judgment therein had and obtained, there shall not need to be Fifteen Days between the *Teste-day* and the Day of Retorn of any Writ of *Ven' fac'*, *Hab' corpora jurat'*, *Distringas jurat'*, *Fieri facias* or *Capias ad Satisfaciend'*, and the want of Fifteen Days between the *Teste-day* and the Day of Retorn

torn of any such Writ, shall not be assigned for Error.

If an Original in *B. R.* be ill, Error upon it lies not but in Parliament, *Sid. p.* 42.

Action of Ejectment, and also Battery in one Writ, and it was moved in Arrest of Judgment, because Battery was joyned in Ejectment, the Damages were found severally, and the Plaintiff released the Damages for the Battery, and prayed Judgment for the Ejectment, and had it; 1 *Brownl.* 235. *Bide* and *Snelling*.

Of Appearance.

Judgment against the casual Ejector for want of Appearance.

If the Tenant in Possession do not appear in due time after the Declaration left with him, and enter into the Rule for confessing Lease-Entry and Ouster, then upon *Affidavit* made of the Service thereof, and Notice given him to appear, upon Motion the Court will order Judgment to be entred up against the casual Ejector.

In Ejectment or any other personal Action, if the Defendant do appear upon the first Retorn in *Hillary* or *Trinity* Term, there can be no Imparlance without Consent or special Rule of Court.

Infant, how to appear.

In Actions real and mixt against an Infant, he ought to appear by Guardian, and not by Attorney; and Judgment in *Ejectione Firme in Banco* against the Infant Defendant upon a Verdict had against him, was reversed for this Cause, 1 *Rolls Abr.* 287. *Lewis* and *Johns.*

Ejectione

Ejectione Firme was brought against *Thomas* the Father and *J.* the Son; the Father appeared by *T. C. Attornat' suum*, and the said] *J. per eundem T. C. proximum amicum suum* who was admitted *per Cur' ad prosequend'* this is Error: A Guardian and *Prochein Amy* are distinct, and a Guardian or *Prochein Amy* may be admitted for the Plaintiff and a *Prochein Amy* is appointed by *W.* 1. *c.* 47. *W.* 2. *c.* 15. in case of Necessity, where an Infant is to sue his Guardian, or that the Guardian will not sue for him, and therefore he is admitted to sue *per* Guardian or *Prochein Amy*, where he is to demand or gain; but when he is to defend a Suit in Actions Real or Personal, it always ought to be *per Gardianum*, and the Guardian ought to be admitted *per Cur'*. Therefore the Defendant ought always to appear by Guardian, and not by *Prochein Amy*; and also to admit the Defendant *ad prosequend'*, is ill and prepostrous, *Cro. Jac.* 640. *Moby* and *Shepard*.

Infant, how to sue or defend.

The Difference between Guardian and *Prochein Amy*. Want of

Pledges.

Error of a Judgment in C. B. in *Ejectione Firme* assigned in 1 *Cro.* 91, 594. in not certifying Pledges (on Diminution alledged) in a Writ of Error, for that Cause *per Cur'* Omission of Pledges, or of one, is Error, tho' after a Verdict; and the Defendant after *in nullo est erratum* pleaded, may pray Diminution, which cannot be granted but on Motion, and then only to affirm the Judgment; yet when the Record is come in,

Pledges not assigned for Error, because Diminution was not pray'd.

in, it may be made uſe of to avoid the Judgment; and becauſe Diminution was not prayed, the Court conceived it cannot be aſſigned for Error, 1 *Keb.* 278, 281. *Hodges*'s Caſe.

Bail.

In Ejectment againſt Two, one does not put in Bail, it is Error, 2 *Rolls Abr.* 46. *Dennis* Caſe.

In Ejectment on *Non Culp.* pleaded by the Attorney for the Defendant, Verdict was for the Plaintiff, who had Judgment, and Error was brought to reverſe it, becauſe no Bail was put in for the Defendant; yet the Attorney being once retained by Warrant to put in Bail, and took his Fee, and being but common Bail, tho' the Attorney was dead, yet the Bail was then entred, as of the ſame Term it ought to have been done, 3 *Bulſtr.* 181. *Denham* and *Comber.* Common Bail entred after the Attorney was dead.

Treſpaſs is within the Act of 21 *Jac.* which names Treſpaſs generally, but Ejectment is not within that Act. *Stat.* 13 *Car.* 2. *c.* 2. orders Bail on Error in Treſpaſs, 1 *Keb.* 295. *Power*'s Caſe. Stat. 13 *Car.* c. 2.

Note, Error without Bail, is a *Superſedeas* in Ejectment, notwithſtanding the new Act, 13 *Car.* 2. *c.* 2. it being not within the general Word, *Treſpaſs*, *Id. p.* 308. *Luſton* and *Johnſon.*

Tr. 14 *Car.* 2. *B. R.* ordered that Common Bail ſhall be filed for the Defendant before any Declaration by Bill in ſuch Action ſhall be delivered to the Tenant in Poſſeſſion When common Bail to be filed.

ſion of the Lands in ſuch Declaration contained, and that if the Attorney for the Plaintiff in *B. R.* ſhall fail thereof, then no Judgment for the Plaintiff ſhall be entred againſt the caſual Ejector, nor ſhall the Tenant in Poſſeſſion confeſs Leaſe-entry and Ouſter at the Trial.

Imparlance. Attorney was made Leſſee in Ejectment, and he would not grant an Imparlance to the Defendant, as the Courſe is, becauſe he is Attorney of this Court (*B. R.*) and ſo claims Priviledge that the Defendant may anſwer him this Term, or elſe he will enter up Judgment againſt him for want of a Plea. *Quære. Stiles Rep.* 367.

CHAP.

CHAP. IV.

Against whom Ejectione Firme *lies, or not, and of the casual Ejector. Of the old way of Sealing Leases of Ejectment by Corporations; by Baron and Feme; in what Cases now to be used.*

Ejectione Firme against one *Simul cum*, had been ruled to be good, and so used in the *Common Pleas*, tho' heretofore it was adjudged to the contrary, *Stiles Rep.* 15.

It lies against Baron and Feme, *Lib. Intr.* 253. 9. *Rep.* 77. *e. Peytoe's* Case. *Plo.* 187.

It lies against the Ejector or wrong Doer, be who he will.

When the Course was to seal an Ejectment to try a Title of Land, the Ejector in Law was any Person that comes upon any part of the Land, *&c.* in the Ejectment-Lease, tho' it be by chance, and with no intent to disturb the Lessee of Possession, next after the Sealing and Delivery of the Ejectment-Lease; and such an Ejector was a good Ejector, against whom an Action of *Ejectione Firme* may be brought to try the Title of the Land in Question. But he that was to try a Title of Land in Ejectment, ought not to have made an Ejector of his own, against whom he might bring his Action; or to consent or agree with one to come upon the Land let in the Ejectment-Lease, with an Intent to make him an E-

Who was accounted an Ejector formerly.

ctor, and to bring his Action againſt him; for by that means the Tenant in Poſſeſſion of the Land, was after put out of Poſſeſſion by a Writ of *Habere fac' poſſeſſionem*, without any Notice given to him or his Leſſor of the Suit; but now the Law is otherwiſe, and altered by the new way of Practice.

The new courſe in Ejectments.

For now it is not uſual to ſeal any Leaſe of Ejectment at all in this Action, but the Plaintiff that intends to try the Title, feigns a Leaſe of Ejectment in his Declaration, and an Ejector, and draws a Declaration againſt his own Ejector, who ſends or delivers a Copy thereof to the Tenant in Poſſeſſion, giving him Notice to appear and defend his Title, or elſe the Ejector will confeſs, or ſuffer Judgment by Default: But if the Tenant or the Leſſor will defend the Title, then it is uſual for them to move the Court that they may be made Ejector to defend the Title (that is) the Tenant appears, and conſents to a Rule, with the Plaintiff's Attorney, to make himſelf Defendant in the room of the caſual Ejector, and this the Court will grant, if he will confeſs Leaſe, Entry and Ouſter, and at the Trial ſtand meerly upon the Title; but if they do not at the Trial confeſs Leaſe, Entry and Ouſter, then the Judgment ſhall be entred againſt the caſual (*viz.*) the Plaintiff's own Ejector.

Note, The Court ſaid in *Addiſon*'s Caſe, *Mod. Rep.* 252. That they take no Notice judicially, that the Leſſor of the Plaintiff is the Party intereſted, therefore they puniſh the Plaintiff, if he releaſe the Damages; but in point of Coſts they take notice of him.

But

But before I proceed further, I hope it will not be tedious a little to shew how the Law and Practice was taken when Ejectment-Leases were sealed, and Entries to be duly made, and Warrants of Attorney made to deliver the Lease upon the Land by a Corporation, Baron and Feme, *&c.* especially considering that in Inferiour Courts the old way of actual sealing Leases is continued, *Winch* 50. 1 *Brownl* 129. *Godb.* 72. Earl of *Kent*'s Case.

The old way of Sealing Leases of Ejectment.

And first, The way to execute a Lease to try a Title, the Land being in many Men's Hands, was to enter into one of the Parcels, and leave one in that place; and then he must go into another, and leave one there, and so of the rest; and then after he had made the last Entry there, he sealeth and delivereth the Lease; and then those Men that were left there, must come out of the Land. But when a Title was to be tryed by Ejectment, and a Lease to be executed by a Letter of Attorney, the Course was, That the Lessor do seal the Lease only, and deliver it as an Escrow, and the Letter of Attorney, and deliver the Letter of Attorney, but not the Lease; for the Attorney must deliver that upon the Land. And upon Ejectment brought of Land in Two Villages, as of an House and Forty Acres of Land in *A.* and *B.* and a special Entry in the Land adjoyning to the House (*viz.*) the putting in of an Horse which was drove out of the Land by the Defendant, this was adjudged a good Entry for the Land in both the Villages *per totam Curiam.* So of Lands

in one County, *Palmer*, 402. *Argoll* and *Cheney*.

By Corporation. The Corporation of Mercers were ſeiſed of the Lands in Queſtion, in the ſeveral Poſſeſſions of Two Men; and being ſo ſeiſed, made a Deed of Leaſe to the Plaintiff and a Letter of Attorney to deliver the Deed and the Poſſeſſion. The Attorney entred upon the Poſſeſſion of one of the Men, and there delivers the Deed, and after enters in the Poſſeſſion of the other, and there doth deliver the Deed; the Queſtion was, If it were good for the Land for which the ſecond Delivery was, becauſe one Deed cannot have two Deliveries; but the Court held, it ſhall be intended the firſt Delivery was good for all, and it ſhall not be intended but that the two Men had Poſſeſſion only as Tenants at Will to the Corporation, and then the Delivery of the Leaſe in one place, is good for all; and it ſhall not be intended they had an Eſtate for Years or Life, except the contrary be ſhewed.

By Baron and Feme. Baron and Feme joyn in a Leaſe by Indenture to *B.* rendring Rent for Years, and make a Letter of Attorney to ſeal and deliver the Leaſe upon the Land, which is done. *B.* brought Ejectment, and declares of a Demiſe made by the Baron and Feme; and upon evidence to the Jury, it was ruled *per Cur'*, That the Leaſe will not maintain the Declaration; for a Feme covert cannot make a Letter of Attorney to deliver a Leaſe of her Land, but the Warrant of Attorney is meerly void; ſo that this only is a Leaſe

of

of the Husband, which is not maintained by the Declaration. But *Hopkins*'s Caſe in *Cro. Car.* 165. is againſt this, where the Plaintiff declared of a Leaſe made by Baron and Feme; On Not guilty, it appeared on the Evidence, that the Leaſe was ſealed and ſubſcribed by them both, and a Letter of Attorney made by them to deliver it upon the Land; *Per Cur'* it's a good Letter of Attorney by them both, and the Leaſe well delivered, and it is a Leaſe of them both during the Husband's Life, *Yelv. Wilſon* and *Rich.* 2 *Brownl.* 248. *Plomer*'s Caſe. *Cro. Car.* 165. *Hopkin*'s Caſe. 2 *Leon.* 200.

CHAP.

CHAP. V.

Of the Rule of confeſſing Leaſe, Entry and Ouſter, and Rules of Court relating thereunto. Of Refuſal to confeſs Leaſe, Entry and Ouſter, and the Conſequence. Of how much the Defendant ſhall confeſs Leaſe, Entry and Ouſter. In what Caſes there muſt be an actual Entry, and where it is ſupplied by confeſſing of Leaſe, Entry and Ouſter. Rules concerning ones being made Defendant, and of altering the Plaintiff; and of the Ejectment-Leaſe.

HOW neceſſary the Knowledge of this Practice is to one who would manage his Client's Cauſe with Diſcretion and Succeſs, is ſufficiently apparent, and needs no further Recommendation.

Ejectment in Inferiour Courts.

It muſt be obſerved (as was adjudged in the Mayor of *Briſtol*'s Caſe) that there, or in any other Inferiour Court, they cannot make Rules to confeſs Leaſe, Entry and Ouſter, as in the Courts of *Weſtminſter*, but they muſt actually ſeal the Leaſe, as at Common Law. And ſo it was in *Sherman* and *Cook*'s Caſe, where it was moved, That the Defendant, who by *Habeas Corpus* had removed an Ejectment out of the Sheriff's Court, might conſent to a Rule of Court, that he ſhould confeſs Leaſe, Entry and Ouſter; but the Court refuſed, the Defendant not being bound by the Rule below; becauſe

cauſe they cannot proceed by way of delivering Declarations to the Tenants in Poſſeſſion, but as at Common Law by actual Leaſe ſealed: And by *Hyde*, all the Tryals below are tried in the caſual Ejector's Name by him that is Tenant in Poſſeſſion, to avoid Charge. *P.* 16 *Car.* 2. *B. R. M.* 16 *Car.* 2. *B. R.*

Tryals below, how.

Where the Freeholds are ſeveral, and one Defendant gives a Note of what is in his Poſſeſſion, the Plaintiff muſt ſever his Action, elſe the Defendant might loſe his Coſts, for which on ſeverance he would have legal Remedy. And here is no Inconvenience, becauſe the Plaintiff may take Judgment againſt his own Ejector for the reſt; and the Defendant ſhall not confeſs Leaſe, Entry and Ouſter of all, but only of ſo much as is in his own Poſſeſſion, which is the only way to ſave his Coſts. And *Medlicot*'s Caſe was, where the Plaintiff's Title is one by the Demiſe of *A.* and the Defendant's ſeveral, the Plaintiff offered to ſecure Coſts ſeverally to all; but he was ordered by the Court to deliver ſeveral Declarations, that none may defend for more than is in his own Poſſeſſion, elſe the Plaintiff might clap in an Acre of his own to ſave Coſts: and Agreements of Parties are no Guide to Rules, but would make the Court but Arbitrary; and this Rule is no hindrance of Tryals at Bar, where many Defendants have but the ſame Title, *Tr.* 21 *Car.* 2. *B. R. Medlicot*'s Caſe.

Where the Freeholds are ſeveral, the Plaintiff muſt ſever his Action.

The Defendant not to confeſs Leaſe, Entry and Ouſter for any more than is in his own Poſſeſſion.

In Ejectment the Ouſter was confeſſed of a third part of a fourth part of a fifth part in five parts to be divided, which by *Hide*

The Inconvenience of the new Course of leaving Declarations.

is very inconvenient, and crept in since the new Rule of leaving Declarations, the Lands being in several places distinct from each other, and may be held by several Titles, which could never be, had the old Course of actual Ejectment continued; but on suggestion that the Title was but one, and one Plaintiff, and one Defendant, it was admitted, *M.* 15 *Car.* 2. *B. R. Cole* and *Skinner.*

In Ejectment where there are divers Defendants who are to confess Lease, Entry and Ouster, if one doth not appear at the Tryal, the Plaintiff cannot proceed against the rest, but must be nonsuited, 1 *Ventr.*

In what case the Court will give leave to retract the general Confession of Lease, Entry and Ouster.

In Ejectment the Plaintiff shewed Copy of four Acres, to save Costs, the Title being on Will or no Will; but not being able to prove where particularly, the Court gave leave to the Defendant that claimed by the Will, to retract the general Confession of Lease, Entry and Ouster as to this, and to have Judgment against the casual Ejector, *M.* 27 *Car. B. R. Hide* and *Preston.*

If the Defendant refuse to confess Lease, Entry, and Ouster, the Rules are thus:

Of the Defendant's Refusal to confess Lease, Entry and Ouster.

Where the Defendant was by Rule of Court at the Tryal (which was to be at the Bar) to appear and confess Lease, Entry and Ouster, and to stand upon the Title only, yet at the Tryal he would not appear; upon which the Plaintiff was Non-suit, and yet Judgment was for the Plaintiff upon the Rule, and he was ordered to pay the Jury.

And

And in *Davies's* Case, 13 *Car.* 2. *B. R. H.* desired to be made Defendant, confessing Lease, Entry and Ouster, and at the Tryal resolved so to do; but the Court denied that he should pay Costs, because thereby the Plaintiff hath recovered, and so hath the Fruit of his Suit. But in *Williams* and *Hall's* Case, on Tryal at Bar the Defendants refused to confess Lease, Entry and Ouster, *per quod* the Plaintiff was Non-suited; and it was moved, that in regard the Default was the Defendant's, that the Plaintiff might have Attachment against the Defendant, according to the Course of the Common Bench, which the Court granted. So upon a Judgment against his own Ejector in default of confessing Lease, Entry and Ouster, without a special Rule, no Costs shall be paid by *H.* the Tenant in Possession that made this Default, because the Plaintiff hath Benefit of his Suit (*viz.*) Judgment against the Ejector, whereby he may recover Possession. *Stiles p.* 425. 13 *Car.* 2. *B. R.* 15 *Car.* 2. *B. R.* 1 *Keb.* 242.

To pay no Costs.

The Form of the Rule of Confessing Lease, Entry and Ouster in *B.R.* & *B.C. Vide infra.*

Of

Of the Effect of an Entry according to the Rule, and where it will ſupply an actual Ouſter, and where not.

Where confeſſing Leaſe, Entry and Ouſter, will ſupply an actual Ouſter, or not.

Ejectment was brought by Deviſee of a Rent, on Condition, That if a Legacy be not paid yearly, *&c.* that it ſhall be lawful for the Deviſee to enter; and after the Demand made of the Rent, this Action was brought, and the Leaſe, Entry and Ouſter was confeſs'd. *Per Windham*, this is only of an Entry ſufficient to make the Leaſe that entitles to the Action, not of an Entry that gives Title to the Land; and for Non-proving of an actual Entry, the Plaintiff was non-ſuited: But otherwiſe in caſe of a Leaſe rendring Rent, to be void by Re-entry by Non-payment. In the Ejectment there was a Rule for confeſſing Leaſe, Entry and Ouſter, and the Queſtion was, Whether this be ſufficient without Proof of actual Entry? *Per Hales* C. J. the Confeſſion is ſufficient, elſe in every Caſe of Diſſeiſin, *&c.* the Entry muſt be proved; but in Aſſignment of Aſſignee of Leſſee, ſuch Confeſſion doth not avoid the Aſſignment, but that muſt be proved; and this is as actual Leaſe on the Land, wich cannot be without Entry. And ſo is 1 *Ventr.* 248. *Anonym.* The Leſſor of the Plaintiff had a Title to enter for a Condition broken for Non-payment of Rent; Leaſe, Entry and Ouſter was confeſſed, and the Court was moved, that in regard that the Leſſor having ſuch a ſpecial Title, and

no

no Eſtate till Entry, whether ſuch an Entry ſhall be ſupplied by the general Confeſſion, or that there ſhould be an actual Entry; and it was held, it ſhould be ſupplied by the general Confeſſion: But by *Hales*, If *A.* lets to *B.* and *B.* to *C.* to try the Title, the confeſſing of Leaſe, Entry and Ouſter extends only to the Leaſe made to *C.* and not to that made to *B. P.* 26 *Car.* 2. *B. R. Abbot* and *Sorrel*'s Caſe. *M.* 25 *Car.* 2. *B. R. Wither* and *Gibſon.* 1 *Ventr.* 248. *Anonym.*

In *Okely* and *Norton*'s Caſe, *M.* 22 *Car.* 2. *B. R.* Judgment was prayed for not confeſſing Leaſe, Entry and actual Ouſter by one Coparcener againſt another; *Per Cur'* on the former Rule to confeſs Leaſe, Entry and Ouſter generally, actual Ouſter need not be confeſſed, and Judgment was againſt the caſual Ejector. The Rule to confeſs Leaſe, Entry and Ouſter, does not extend to confeſs actual Entry upon a Leaſe, which is the Title; but the Court ſaid, An Entry ſhall be intended, until the contrary be proved of the other ſide. The Caſe was upon Evidence to a Jury at the Bar. The Plaintiff's Title was a Leaſe for Five thouſand Years, which Leaſe was ſealed and delivered at *London*; and the Council for the Defendant would put the Plaintiff to prove an actual Entry by force of this Leaſe; for it was agreed, That the Rule to confeſs Leaſe Entry and Ouſter, doth not extend to it; but *per Cur'* it ſhall be intended that he entred, until the contrary be proved on the other ſide, *M.* 22 *Car.* 2. *Okely* and *Norton. Sid. p.* 223. *Langhorn* and *Merry.*

The Rule to confeſs Leaſe entry and Ouſter, does not extend to confeſs actual Entry upon a Leaſe which is the Title.

Upon

Upon a Tryal in Ejectment the Title of the Plaintiff's Leſſor appeared to be by a Remainder limited to him for life upon divers other Eſtates, and that there was a Fine and Proclamation; but he within the Five years after his Title accrewed, ſent two Perſons to deliver Declarations upon the Land, as the uſual Courſe was upon Ejectments brought; *Per Cur'* this is no Entry or Claim to avoid the Fine, he having given no expreſs Authority to that purpoſe, and the Confeſſion of Leaſe, Entry and Ouſter ſhall not prejudice him in this reſpect, *M.* 25 *Car. B. R. Clark* and *Phillips.*

As for ones being made Defendant, the Rules are thus.

The Defendant to give a Note of what is in his Poſſeſſion.

He that deſireth to be made Defendant in Ejectment for as much as is in his Poſſeſſion, or of his Under-Tenant, muſt give a Note to the Attorney of the Plaintiff in Writing of what the Particulars are, of which he is in Poſſeſſion, or his Under-Tenant, to prevent Delay at the Aſſizes, *T.* 15 *Car.* 2. ſo ordered.

Difference between the Courſe in the *King's Bench* and *Common Pleas.*

By *Pinſent.* in *B. C.* If one move that the Title of the Land do belong to him, and that the Plaintiff hath made an Ejector of his own, and therefore prays, that giving Security to the Ejector to ſave him harmleſs, he may defend the Title, the Court will grant it, but will not compell the Plaintiff to confeſs Leaſe, Entry and Ouſter, except he will be Ejector himſelf. But it is not ſo in the Court of *King's Bench*, for there

there in both Cases, they will compel him him to confess Lease, Entry and Ouster, *Stiles Rep.* 368.

The Course of the Court is, That one that cometh in to be made Defendant in Ejectment, upon his Prayer confessing Lease, Entry and Ouster, shall not be charged with any Actions by the by; because he comes in without Process or Arrest, only to defend the Title.

He that is made Defendant in Ejectment, not to be charged with Actions by the by.

In Ejectment after Declaration and before Plea, he which had the Title, moved the Court for to alter the Plaintiff, because he was to give evidence; and the Court agreed to it, that he should alter the Plaintiff paying Costs, and giving Security for new Costs; and they may alter the Plaintiff in this Action upon the same Reason that they may alter the Defendant, which is usually done, 1 *Siderf. p.* 24.

Motions to ter the Plaintiff, and why.

Note, After Default (in Ejectment) the Defendant may confess Lease, Entry and Ouster, and may give evidence, and have all Advantages (except Challenges) and if the Plaintiff becomes Non-suit, any one for the Defendant may pray it to be recorded, *Tryals per pays*, 195.

After Default in Ejectment the Defendant may confess Lease, Entry and Ouster.

The Defendant was by Rule of Court at the Tryal which was to be at the Bar to appear and confess Lease, Entry and Ouster, and to stand upon the Title only, yet at the Tryal he would not appear; upon which the Plaintiff was Non-suit, and yet the Judgment was for the Plaintiff upon the Rule, and he was advised to pay the Jury. *Stiles Rep.* 425. *Harvey* and *Mountney*.

Of

Of the Ejectment-Leaſe.

You may obſerve what before is ſaid, That it's a feigned Leaſe, and by the new Rule is to be confeſſed; and it's laid ſometimes for three years, or five, or ſeven years: And it is good to lay it for longer than three or five years; for I have known by Injunctions and other Dilatories it hath worn five years out, and then the Plaintiff cannot have Judgment without beginning *de novo*. And therefore *Pemble* and *Sterne's* Caſe being adjourned into the *Exchequer-Chamber*, the Court ordered an Enlargement of the Leaſe or Term from ſeven to twelve years, which they may do by Law, no Leaſe ever being actually ſealed, but declared on, and conſented to, *Tr.* 21 *Car.* 2. *Pemble* and *Sterne's* Caſe.

Enlargement of the Leaſe for a longer Term by the Court.

The Leaſe was 24 *Sept. Habend.* from *Michaelmas* next, *virtute cujus* the Plaintiff entred, and ſaid not when; *Per Cur'* it ſhall be intended on the day after *Michaelmas*; but if it had been *virtute cujus* he entred *eod'* 24 day of *Septemb.* it had been ill. *P.* 26 *Car.* 2 *Hallam* and *Scot.*

Virtute cujus he entred.

Leaſe of all Warrants Ejectment of Part.

Ejectment by Leſſee of Leſſee of the whole by the Daughters and Heirs of Sir *Peter Vanlore*, which was made by reaſon of the uncertainty of the Part claimed by the Plaintiff, 2 *Keb.* 700.

How the Leaſe to be made where there are ſeveral parts uncertain claimed.

Leaſe

Leaſe made to try a Title in Ejectment, is not within the Statute of Buying of Titles, if it be not made to great Men, but to a Servant of him that hath the Inheritance, 2 *Brownl.* 133.

Leaſe to try Title, no Maintenance.

Note, Ejectment may be brought upon a Leaſe made in the ſame Term, 1 *Ventris.*

Upon a Leaſe made by Husbands and their Wives for the Tryal of a Title, and the ſame executed by Letter of Attorney; the Leaſe and Letter of Attorney were only ſealed by the Husbands, and ſo not good; *Per Cur'* the Wives ought to have ſealed alſo, and the Entry of the Attorney ought to have been in all their Names. This by the old Courſe, 2 *Roll.* 2. 13.

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CHAP.

CHAP. VI.

Of Declarations. Of what things an Ejectione Firme *may be brought, and what not. General Rules of Declarations in Ejectments. Variance between the Iſſue-Roll and the Imparlance-Roll. Of Entry and Ejectment ſuppoſed before the Commencement of the Leaſe,* virtute cujus *be entred, how taken and expounded. Uncertainty in the Limitation of the Commencement, and no Day of the Date ſhewed.* Et poſtea, *&c. how expounded. The manner of Declaring by Coheirs, by Tenants in Common, by Baron and Feme, by Joynt-tenants, by a Corporation, by Copyholder, by Adminiſtrator.*

THE new way of Tryals in Ejectment by Confeſſion of Leaſe, Entry and Oüſter, and ſtanding only upon the Title, make ſome Perſons conceive that Caſes or Reſolutions about Declarations in Ejectments (whoſe Form is now generally ſetled) to be uſeleſs and antiquated. And in truth they are ſo in a great meaſure; and yet notwithſtanding there are ſeveral good Rules and Reſolutions, as well relating to matters of Law as Practice, and Forms, even ſince the ſaid new Method has been taken up, both as to what things an Ejectment may be brought, or not, and Delivery, Entry, Variance, and Amendments of Declarations; as alſo how Declarations ought to be, when Coparceners, Joyntenants, Corporations

tions, Baron and Feme, Tenants in Common, Administrators, and the like, are concerned. And yet even those former Cases and Resolutions as to the Commencement of Leases and Demises on which the Declaration is, and the Dates and precise Times of Entry and Ouster, deserve well to be considered; not only as so many curious Points of Law therein argued, of which it's not to be thought a general Lawyer would be ignorant; but because in Inferiour Courts the old way of delivering Declarations, is and must be used.

I shall therefore in the first place cite some of the principal Cases touching the manner of declaring in former times, as to the Dates and Commencement of Demises, *&c.* and then come to those Considerations and Rules which are of present Use, both as to Delivery, Entry, Forms, and the like, in which many Practisers may not be well informed, and which are founded upon late Resolutions. But first I shall shew how Declarations are to be laid in respect of the Matter and Things for which the Ejectment is brought; concerning which the Cases in our Books are very frequent, and very useful to be known.

Of what things an Ejectione Firme *may be brought, and what not.*

Ejectment lies not *de una domo*, because it may be a Dowe-house or Dwelling-house; *De Domo* but *Cro. Jac.* 654. in *Royston's* Case *contra*, that it lies *de domo*, as well as waste *de do-*

mibus, but it lies *de domo vocat'* Holts, 2 *Roll. Rep.* 487, 482. *Warren's* Case. *Cr. Jac. vid. in Pasch.* 1650. *Fry and Pooly. Hard.* 76.

De Tenemento. *Ejectment* lies not *de uno tenemento. Ejectment* was brought of an House and the Moiety of a Tenement; it lies not for the Moiety of a Tenement; Verdict was (in this Case) given for the Plaintiff and intire Damages. The Plaintiff my well release his Damages, as to the Tenement, and take his Judgment for the House, and then it shall not be Error, 2 *Bulst.* 28. *Rothowick* and *Chappell.*

Where the Plaintiff may aid himself by release of part.

De Burgo. *Ejectment* lies *de uno Burgo*, *Hardr.* 123. *Danver's* Case.

De Cubiculo. *Ejectment de uno cubiculo*, is good; as it was laid, it was *unius Cubiculi*, *per nomen unius Cubiculi* being in such an House in the middle Story of the said House. The word *Cubiculum* is a more apt word than *Camera. Ejectment de una Rooma*, it was said had been adjudged good in *B. R.* So a *Præcipe* lies of an Upper-Chamber, 3 *Leon. p.* 210. 2 *Rolls Rep.* 48.

De Repositorio. *Ejectment de uno repositorio*, Judgment was reversed, because it was uncertain, it not being expounded in *English*, it was intended a Ware-house, *W. Jones* 454. *Sprig's* Case. *Cro. Car.* 551. mesme Case.

De Capella. It is not formal to bring *Ejectment de una Capella*, but it ought to be by the Name of a Messuage or House, 11 *Rep.* 25. *b.*

De septem Messuagiis sive Tenementis. *Ejectment de septem Messuagiis sive Tenementis*; it's ill after a Verdict for the uncertainty, *Cro. El.* 146.

Ejectment

Ejectment de uno Meſſuagio ſive tenemento vocat' the *Black Swan*, is good *per Twiſden*; for the laſt words aſcertain it. Had the Verdict been general for the Plaintiff for the Meſſuages, and *Non Culp'* for the Tenements, it had been good: And in this caſe the Plaintiff cannot aid himſelf by releaſing of part, as it might be, had there been Lands in the Declaration. *De Meſſuagio ſive Tenemento* is ill after a Verdict, but if the Judge will allow the Jury to find for the Plaintiff for the Meſſuage and for the reſidue for the Defendant, it had been good; but the Plaintiff may not aid himſelf by Releaſe, *Siderf.* 295. *Burbury* and *Yeoman*. *De uno Meſſuagio ſive Tenemento vocat'.*

Ejectione Firme lies not *de Coquina*, but it lies by Bill in *B. R.* tho' *Coke* ſaid it lies by Writ too, and the Law is all one, 1 *Roll. Rep.* 55. *De Coquina.*

It was adjudged in *Stiles Rep.* 215. That *Ejectment* doth lie of a *Cottage*, becauſe the Deſcription of a thing by that Name is ſufficient and certain enough to ſhew the Sheriff of what to deliver the Poſſeſſion; but a Recovery lies not of a Cottage, *Stiles p.* 258. *Hammond* and *Ireland*. *Cro. El.* 818. *Hill* and *Gibs*. *De Cotagio.*

Ejectione Firme lies *de Pomario*, and *de Domo*, for they are certain enough to give Poſſeſſion, tho' a Precipe lies not of it; and many things are recovered in Ejectment, which are not named in the Regiſter, as Hopyard, *&c. Cro. Jac.* 654. *Royſton* and *Eccleſton. Palmer*, 337. meſme Caſe. *Cro. El. p.* 854. *Wright* and *Wheatly*. *De Pomario.*

De molendinis. *Ejectione Firme de quatuor molendinis*, without expreſſing whether they are Windmills or Water-mills, yet good, *Mod. Rep.* 9. *Fitz Gerard's* Caſe.

De pecia terræ. In *Palmer* and *Humphrey's* Caſe it was adjudged, That *Ejectment* lies *de pecia terræ*; but it was after reverſed in the *Exchequer-Chamber*, *Cro. El.* 422. *Palmer* and *Humphrys*.

And a Declaration *de una pecia terræ continen' ducentas & unam Acram ſive plus ſive minus jacent' inter terras*, &c. this was adjudged ill after a Verdict, and *Nil cap' per Billam* entred. So *continen' dimidiam acram terræ vocat'*. It was laid in *Hancock* and *Pryn's* Caſe, *Ejectment* of a Cloſe of Land, or *de pecia terræ* containing ſo many Acres, had been good, *W. Jones*, *p.* 40c. *Savil* 176. *Hardr.* 57.

De Manerio. *Ejectione Firme* cannot be of a Manor, for that there cannot be an *Ejectment* of the Services; but if they expreſs further a Quantity of Acres, it is ſufficient, and it lies of a Manor or the Moiety of a Manor, if the Attornment of Tenants can be proved; and there is none that brings *Ejectment* of a Manor, but they alſo add the Acres that contain it, to the end that if they prove it not a Manor, they may recover according to the Acres. *Vide infra. Hetley* &c. *Norris* and *Iſham.* And *p.* 146. *Warden's* Caſe.

De Croſto. It was doubted by *Rolls* and the Court, if an *Ejectment* lies *de Croſto*, therefore the Plaintiff moved for a ſpecial Judgment for the reſt of the Land contained in the Declaration, and releaſed the Damages as to the

Croſt,

Croft, and had it; but afterwards in *Meeres* and *French*'s Caſe it was agreed, That *Ejectione Firme* lies of a *Croft*, and Dower, and Aſſiſe will lie of a *Croft*, becauſe it is put in View of the Recognitors. tho' a *Formedon* nor *Præcipe* will lie of it, but 2 *Car. p. Rot.* 301. *Holmes* and *Wingreve*, *de Crofto* is ill in Ejectment, tho' good in Aſſiſe. *Rolls Rep. p.* 30.

Ejectment de uno Clauſo without ſaying how many Acres, is ill. A Man makes a Leaſe of a Garden containing Three Roods of Land, Leſſee is ouſted and brings *Ejectment*; the Juſtices differed in Opinion, whether it were good or not; but all agreed the beſt order of Pleading to be, to declare, That he was ejected of a Garden containing Three Roods of Land, *Godb. p.* 6. *De uno Clauſo.* *De tribus Roods of Land.*

Parcella terræ does not comprehend a Garden in *Ejectione Firme*, *Moor* 702. *Palm.* 45. *Parcella terræ.*

Ejectment de uno Clauſo continen' tres Acras per eſtimationem, ill; but Indictment *quare vi & armis in Clauſum continen' tres Acras per Eſtimationem fregit*, is good. Debt or Demiſe of Seven Acres *per eſtimat'*, is ill, *Dormer*'s Caſe. *Brownl. p.* 142.

Tho' in *Co.* 11 *Rep.* 55. *Savill*'s Caſe, That an *Ejectione Firme* lies not of a Cloſe, yet the contrary had been ſince adjudged between *Hykes* and *Sparrow*, *Tr.* 15 *Jac. Rot.* 774. *Cr. Car.* 555. *Siderf.* 229.

Declarat' is *Quod cum dimiſit* to him *unum Meſſuagium, unum Clauſum vocat'* Dovecoat-Cloſe *continen' tres Acras eidem meſſuagio ſpectan', per Cur'* it does not lie of a Cloſe,

tho' coupled with other Words, because the Quality of the Soil is not alledged, as to say, Land, Meadow, Marsh, *&c.* And by *Coke*, if he had bound the Land without shewing the Quality, it had not been good; tho' it was objected, that by all the Words put together, here is sufficient certainty to put the Party in Possession; and yet some Reports are to the contrary. *Ejectione Firme* of a Close called *White-Close*, was said to be held good in *Ellis* and *Floyd's* Case cited in *Madonell's* Case. But in *Ireland Ejectment* was of a Close called *the Upper Kibwell*, and of another called *the Lower Kibwell*, containing Three Acres of Land, was held good. And it is a sure Rule, That the certainty of the Land ought to be described, and the Quality, *&c.* And therefore the Case of *Jones* and *Hoell* seems not to be Law, which was *Ejectione Firme* of Seven Closes, one called *Green Mead*, and so gave to the others several Names, and the Verdict was for the Plaintiff, and by the Court there it's well enough; For, said they, when a Name is given to every Close, tho' the Contents of Acres are not mentioned, *viz.* so many of Land, so many of Pasture, i'ts sufficient, and aided by the Statute of *Jeofayls*, 11 *Rep.* 55. *Savill's* Case. 1 *Roll. Rep.* 55. mesme Case. *Cro. Jac.* 435. *Wilks* and *Sparrow*. 2 *Roll. Rep.* 1. 608, 189. *Macdonel's* Case. *Cro. El.* 235. *Jones* and *Hoell*.

Regula.

It's not distinguished how much of Pasture, and how much of Meadow, *ergo* ill.

In *Martin* and *Nichol's* Case Error was assigned, because the Declaration was of a Messuage, and Forty Acres of Land Meadow and Pasture thereunto appertaining, and

and it was not diſtinguiſhed how much there was in Land, and how much in Paſture, and the Judgment was reverſed, *Cro. Car.* 573. *Martin* and *Nichols.*

Obſerve, In *Ejectione Firme* or a *Præcipe* of 100 Acres, this is according to Statute-meaſure; but if one bargain and ſell 100 Acres of Land to another, that ſhall not be according to the Statute-meaſure, but after the uſual Account in the Country; in *Andrews* Caſe cited in *Ewer* and *Heydon*'s Caſe. Acres according to Statute-meaſure.

The Declaration was, That he was ejected *è duabus Acris fundi, Anglicè*, Hop-ground. *Per Rolls*, it is good in a Grant, but not in Declarations, and the *Anglice* here does not help it; for the *Anglicè* is not to interpret a Latin Name by which it is called, *Stiles Rep.* 202, 203. *Meers* and *French.* *De duabus acris fundi, Anglice,* Hop-ground.

Ejectment lies *de decem Acris Piſarum*; for in common Acceptance Ten Acres of Peaſe, and Ten Acres of Land ſowed with Peaſe is all one, 1 *Brownl.* 150. *De decem acris Piſarum.*

Ejectment of Three hundred Acres of Waſte, *inter alia*, &c. *per Cur'* Waſte is uncertain, and may comprehend Land of any Quality, and the Sheriff will be at a Loſs what Land to deliver; and after the Plaintiff releaſed the Waſte and Damages, and took Judgment of the Reſidue, *Hardr.* 57. *Hancock* and *Prynn.* *De* 300 Acres of Waſte.

Ejectment lies *de prima Tonſura*, of the firſt Crop, *Cro. Car.* 362. *Ward.* *De prima Tonſura.*

Ejectment lies of a *Cole-mine*, for it is a Profit well known. Ejectment of Land and a Colepit in the ſame Land, ruled to be good, *De Cole-mine.*

because it is in a personal Action, *aliter* in a Real Action, because it is *bis petitum*, 1 *Rolls Rep.* 55. *Cro. Jac.* 21. *Harbotle* and *Placock*.

De un. Boillary of Salt.

It lies of a Boillary of Salt-water, *Siderf.* 161.

De Rivulo aquæ cursu.

Ejectment lies not *de rivulo seu aquæ cursu*, therefore *Godbolt*, *p.* 157. *n.* 213. is not Law; nor a *Precipe* lies of it, and Livery and Seisin cannot be made of it; for *non moratur, non est firma*, but is always fluctuant, and Execution by *habere fac' possessionem* cannot be made of it, but the Action ought to be of so many Acres of Land *aqua coopert.* but if the Land under the River or Place apperrains not to the Plaintiff, but the River only, then upon Disturbance his Remedy is only by Action on the case upon any Diversion of it, and not *aliter*, *Yelv.* 143. *Challoner* and *Thomas. M.* 6 *Jac. Challoner* and *Moor. Cro. Car.* 492. *Herbert* and *Llanghlyn's* Case.

De Profit apprender.

Ejectione firme lies not *de Profit apprender*, and so not of a Common or Rent, nor of a Pischary, it must be *terra aqua cooperta* in such a River, tho' the Court seemed doubtful of it in *Mollineux's* Case, which was Ejectment of an House and Lands in *T. nec non de Libera Pischaria infra Rivulum de Trent* in which Action Damages were entirely given; but to avoid the Question, the Plaintiff released his Damages totally, and his Action *quoad* the Pischary, and had Judgment for the Residue, *Cro. Jac.* 146. *Molineux.*

De Libera Pischaria.

Eject-

Ejectment was brought in *Ireland* of forty Meſſuages, Five hundred Acres of Land, an Hundred Acres of Bogg in the Villages and Territories of *D. S.* and *V.* Bogg is an uſual Word, and well known there, and if it were not, the Plaintiff may releaſe his Demand as to that, and have Judgment for the Reſidue. Another Exception was, becauſe it was in *Villis & Territoriis*; but *per Cur'* it's well enough, and of the ſame Senſe; and if not, it is but Surpluſage, as to the Territories, but Ejectment of 500 Acres of *Mountain* in *Ireland*, is ill, for it is not of one Nature, but ſeveral, as Turfs, Paſture; but a *Precipe* is good *de Saliceto, de Stagno, de Dominio*, by the general Notice the Country hath of them where the Lands lie, and of their Quality. On Ejectment in *Ireland* Error was brought in *B. R.* here, becauſe he brought Ejectment of 40 Acres of Wood, and 20 Acres of Under-wood, and ſo one thing twice demanded, becauſe Under-wood is a Species of Wood, *ſed non allocatur*, becauſe this does not appear to the Court, and this ſhall not be alledged for Error, but ought to be taken in Abatement of the Writ, *Cro. Car.* 512. *Mulcarry* and *Eyres.* 2 *Roll. Rep.* 166, 189. *Macdonnel's* Caſe. 2 *Rolls Rep.* 487, 482. *Warren* and *Wakeley.*

De 100 Acres of Bogg.

In villis & territoriis.

De 50 Acres of Mountain in *Ireland.*

De 40 *Acris boſci, & 40 Acris ſubboſci.*

Ejectione Firmæ be omnibus Decimis is not good; it lies not *de quadam portione Decimarum* generally, but *de quadam portione granorum & fœni* is good; the Nature ought to to be ſhewed, though not the Certainty; and the Ejectment was ſuppoſed in *May*, when

De omnibus Decimis. De quadam portione Decimarum.

when there is not any Tythes, and ſo not good. It may be that all the Tything conſiſts in *Modo decimandi* for Payment of an yearly Sum in Satisfaction of Tythes, whereof no *Ejectione Firme* lies. It was a Queſtion in *Preiſt* and *Wood*'s Caſe, *Cr. Car.* 301. Whether an *Ejectione Firme* lay of Tythes only? it may be of a Rectory, or ſuch a Chapel, and of the Tythes thereunto belonging, whereof an *Habere fac' poſſeſſionem* may be; but it was adjudged *pro Querente*. The Ejectment was ſuppoſed in taking ſo many Loads of Wheat and Barley, being ſevered from the Nine Parts, 1 *Roll. Rep.* 68. cited in *Worral* and *Harper*'s Caſe. 11 *Rep.* 25. *Harper*'s Caſe. *Cro. Car.* 301. *Preiſt* and *Wood.*

De 20 Acris Jampnorum & Bruere.

Ejectment of ſo many Acres *Jampnorum & Bruerue*, and does not expreſs how many of each, yet good, *Mod. Rep.* 9. *Fitzgerard*'s Caſe.

De una Virgata terræ.

Ejectione Firme de una virgata terræ lies not, and ſo it was adjudged in the *Exchequer-Chamber*. Error was brought of a Judgment in *C. B.* in Ejectment *de Virgata terre* on general Verdict, which is ill, being uncertain in every County; but the Plaintiff below might have Releaſed Damages as to that, but now it is too late, *Cro. Eliz.* 339. *Jordan*'s Caſe. 3 *Keb.* 450. *Hall* and *Johnſon.*

De Pannagio.

Ejectione Firme lies not *de Pannagio*. Q. *de Parco*, *Sid.* 417.

De Herbagio.

It lies *de Herbagio*, 2 *Rolls Rep.* 481, 482.

Ejectione Firme was brought for Entry into a Meſſuage *ſive Tenementum*, and four Acres

cres of Land to the ſame belonging, *Per Cur'* the Declaration is uncertain; but it was ſaid, as to the four Acres, it was certain enough, and the Words to the ſame belonging, are meerly void, and the Plaintiff releaſed Damages, and had Judgment, 3 *Cro.* 228. *Wood* and *Pain. Cr. El.* 186. meſme Caſe.

Ejectment lies not of a *Free Warren*, 1 *Keb.* 500. *De libera Warrenna.*

Count of the Moiety of two Acres of Land, is well enough, and Treſpaſs lies againſt the Sheriff, if he does not execute on the right places, 1 *Keb.* 278. *Luſton's* Caſe. *De* Moiety of 20 Acres of Land.

Per Cur' Ejectment lies *de uno Stabulo*, or where-ever the thing is ſo certain that the Sheriff may do Execution, 1 *Keb.* 236. *Whitacre's* Caſe. *De uno ſtabulo*

Separalis Piſcharia uſque ad filum aquæ cannot be counted upon, but *per Windham* ſuch Evidence might be given of ſuch Piſchary by Metes and Bounds, 1 *Keb.* 290. Sir *Chr. Grieſe* and *Adams.* *Separalis Piſcharia uſque ad C.*

Ejectment lies *de Capella*, *per Windham*, 1 *Keb.* 438. *De Capella.*

Ejectment was laid on Demiſe at *T.* of an Houſe and Land *in quodam campo juxta le Caſtle-hill*, which *per Cur'* is ill (on motion in Arreſt of Judgment;) for no Execution can ever be directed to any Sheriff; and it muſt appear where the Land demiſed lieth, 1 *Keb.* 777. *Took* and *Atho.* Of an Houſe and Land *in quodam campo juxta le Caſtle-hill.*

Ejectment of Ten Hides of Land is good; a Hide of Land is the ſame as *Carucat'*, which is as much as a Plow which is uſually intended to have ſix Horſes may manure in what. *De* 10 Hides of Land. *Carucat. terræ*

a

a year, and being 100 or 120 Acres in *Northampton-ſhire*, 1 *Keb.* 877. *Wright* and *Sherrard.*

De Meſſuag. & Tenement'.

Ejectment de 7 Meſſuagiis ſive Tenementis is ill after a general Verdict, and it's on Demurrer; this might have been helped by taking Verdict of either: So it is when the Ejectment is *de Meſſuagio & Tenement'*, it's ill after General Verdict, 2 *Keb.* 80, 82. *Burbury* and *Yeomans.*

Lighthouſe.

Ejectment does not lie of a *Light houſe*, but Action on the Caſe, 2 *Keb.* 114.

Ejectment of the *Pannage* of a Park, is ill, 2 *Keb.* 460.

De Cloſe of Meadow.

Ejectment of a *Cloſe of Meadow* doubted in *Steel* and *Stanly's* Caſe. *M.* 22 *Car.* 2. *B. C.*

600 Acres of Fen-Marſh, Meadow, arable Land.

Ejectment of 600 *Acres of Fen-Marſh, Meadow, arable Lands*: *Twiſden* asked the Plaintiff whereof they would take their Verdict, if they would have it of Marſh; and as ſuch give Execution of the Fens in Queſtion, 2 *Keb.* 23. *Downham* and *Walden.*

De 20 villis & terris in Ireland.

Ejectment de 20 *Villis & Terris* in *Ireland*, the Court conceived it well enough on 1 *Cro.* 512. the Original Judgment being in *C. B.* and affirmed in *B. R.* there, 2 *Keb.* 745.

Ejectment of Two Mills, not ſaying what, good, 2 *Keb.* 875.

De meſſuagio includes a Garden.

Ejectment of a Meſſuage includes a Garden, 3 *Keb.* 44.

De virgata terræ.

Ejectment de virgat' terræ ill on General Verdict, being uncertain in every County; but the Plaintiff below might have Releaſed Damages, as to that; but now it is too late. This was in Error of a Judgment in *B. C.*

B. R. 3 *Keb.* 450. *Hall* and *Johnſon.*

Ejectment of Moor or Meadow, is ill, 3 *Keb.* 529. 3 Moor or Meadow.

Ejectment lies not of Common or Piſchary alone, yet being after Verdict, it ſhould be intended appurtenant, and ſo well enough: This was in Ejectment of a Houſe and 40 Acres of Paſture, *Keb.* 738. *Barton's* Caſe. *De* Common and Piſdhary.

Now as to Declarations in this Action, I ſhall lay down ſome General Rules.

1. The Plaintiff muſt declare on one Title only; and therefore in the Caſe of the Lord *Chandois* and *Pitts*, the Count was of three ſeveral Leaſes of the whole to the Defendant; the Council prayed that one *B.* may be made Defendant, and that the Plaintiff might elect to proceed on one only Title, which the Court granted, and ſaid, Altho' the Party may declare on ſeveral Leaſes, one at, and another from ſuch a Day, yet cannot declare on ſeveral Leſſors. And the Court ordered the Plaintiff to elect one Title only, *Trin.* 22 *Car.* 2. *B. R.*

2. In *Ejectione Firme* of a Cloſe, the Quantity of them and their Nature ought to be expreſſed (*viz.*) Land, Meadow or Paſture. Its a ſure Rule the Certainty of the Land ought to be deſcribed and the Quality, 11 *Rep.* 55. *Savill's* Caſe.

3. In *Ejectione firme* Surpluſage in the Count, is not vicious, *Dyer* 304, 305.

4. If

4. If the Entry and Ejectment be ſuppoſed in the Declaration to be before the Commencement of the Leaſe, the Declaration is void. *Vide Poſtea.*

5. It muſt be alledged in what Vill the Tenements are. *Vide infrà.*

6. The Plaintiff muſt make his Title truly. *Vide infra p. 72. b.*

The Entry to deliver Declarations in Ejectment, is not ſufficient to avoid a Fine, without expreſs Authority to enter to avoid the Fine; ſo was the Caſe reported, 2 *Saunders* 319. Tenant for Life levies a Fine *ſur Coniſance de droit come ceo*, with Proclamation, and he in Reverſion for Life within five Years after the Death of Tenant for Life, directs one to deliver a Declaration in Ejectment to the Tenant in Poſſeſſion; this ſhall not amount to an Entry to avoid the Fine, tho' this was the Declaration which contained the Leaſe upon which the Ejectment was brought, *Keb.* 555. *Clerk* and *Pymell. M.* 21 *Car.* 2. *B. R.*

DECLARATION.

Variance between the Imparlance-Roll and Iſſue-Roll, as to the Commencement of the Leaſe.

In Ejectment in *B. C.* the Plaintiff there declares in the firſt Declaration, which is called the *Imparlance-Roll*, of a Leaſe made the 20th of *September* for five years then next enſuing; and after Imparlance upon the Iſſue-Roll (for there the Plaintiff uſeth to declare again after Imparlance) the Plaintiff declares of

a Leaſe made the 30th of *January* the ſame year *Habend'* for five years from the 20th of *December* before; and upon Iſſue found *pro Quer' per Cur'*, it's erroneous; for he declared upon one Leaſe, and went to Iſſue upon another; for when a Leaſe is made the 30th of *January Habend'* from the 20th of *December* before, this is but a Leaſe in Intereſt till the 30th of *January*, and not before, and only in Computation from the 20th of *December*, and by the Prothonotaries, the Imparlance-Roll is the material Declaration; and if Variance be from it in matter of Subſtance, this is not good nor amendable, tho' it was urged, That the laſt Declaration ſhall be taken as a new Declaration, without any Reference to the other, and then it ſhall be good, 1 *Roll. Rep.* 448. *Millward* and *Watts*. 3 *Bulſtr.* 229. *Millward* and *Watts*. *Cr. Jac.* 315. meſme Caſe.

The Imparlance-Roll is the material Declaration.

But in *Merril* and *Smith*'s Caſe, *Cro. Jac.* 311. the firſt Declaration was, That *T. S.* 25th of *March* 6. *Jan.* let to the Plaintiff the Land, *&c.* for ſeven years, by Vertue whereof the Plaintiff entred and was poſſeſſed until the Defendeant *poſtea ſcil. Anno ſexto ſupradict'* entred and ejected him, ſo there is not any day mentioned. After Imparlance (as the Courſe in the Common Bench is) the Plaintiff made a ſecond Declaration, and there (without any ſpace made) the Ejectment is ſuppoſed to be the 26th of *May Anno ſupradict'*, and the Writ was brought of this Ejectment 7 *Jac.* The Defendant pleads *Non Culp'*, and found againſt him, and Judgment; and this was aſſigned for

The first Declaration is most material.

for Error; *per Cur'* the first Declaration is the principal and material Declaration, and the second is but a Recital of the first. And if any matter of Substance be omitted in the first, it cannot be aided and amended by the second, for that begins with an *Alias prout patet*, so it is but a meer Recital; and therefore if the first be not good, tho' the second be good, and he plead thereto, and the Trial is thereupon, yet the Judgment is erroneous: But as this Case is, the first Declaration is well enough; for he declares of a Lease the 25th of *March* 6 *Jac.* which is the first day of that year, and the Declaration *quod postea scil'* 6 *Jac.* the Defendant ejected him, is certain enough for the year wherein he made the Ejectment; so it appears to be after the Lease made and in the same year 6 *Jac.* wherein the Ejectment was, and the Action is brought the 7 *Jac.* and the Ejectment being made between the making of the Lease, and the Action brought, it's good enough, tho' there is not any certain day alledged, *Cro. Jac.* 311. *Merril* and *Smith.*

Simul cum.

Original in Ejectment was brought against *H.* and three others, and the Plaintiff counts against three of the Defendants, and no *Simul cum* against the fourth, and Judgment was arrested for this, 2 *Brownl.* 129.

Entry and Ejectment supposed before the Commencement of the Lease.

It's a sure Rule, if the Entry and Ejectment be supposed in the Declaration to be before the Commencement of the Lease, the Declaration is void, as in *Powre* and *Hawkins*'s Case cited, *Yelv.* 182. in *Davis*'s Case. The Plaintiff declares upon a Lease of *E.* 27

Apr.

April. Anno ſexto, and lays the Ejectment to be the 26th of *April Anno ſexto ſupradict'*, the Declaration was adjudged ill for this cauſe; but the Court will, and have help'd it by as favourable Conſtruction as may be, as in the principal Caſe in *Yelv.* The Plaintiff declares of a Leaſe made by C. 6 of *May Anno ſeptimo*, of a Meſſuage, *&c.* and that the Plaintiff entred and was poſſeſſed *quouſque poſtea* the Defendant 18 *die ejuſdem menſis Maij Anno ſexto ſupradict'* ejected him; it was moved in Arreſt of Judgment upon Verdict for the Defendant (to ſave Coſts) that the Declaration was inſufficient, for that this Action was grounded on two things (*viz.*) upon the Leaſe and upon the Ejectment, and theſe two ought to be one after the other; and in this Caſe the Ejectment is ſuppoſed an Year before the Leaſe made; for the Leaſe is *Anno ſeptimo*, and the Ejectment ſuppoſed to be made *Anno ſexto*, yet the Declaration was adjudged good, and the word *ſexto* to be void: For the day of the Ejectment being the 18th day *ejuſdem menſis*, it ſhall be intended to be in the ſame year in which the Leaſe is ſuppoſed to be made, *Brownl. p.* 146. meſme Caſe. So in *Adams* and *Gooſe's* Caſe, *Cro. Jac.* 97. In Ejectment the Plaintiff declared of a Leaſe the 6th of *Septemb.* and that he was poſſeſſed, and that *poſtea ſcil.* the 4th of *Septemb.* the Defendant ejected him, and by three Juſtices the Declaration was held good, and the 4th of *September* is impoſſible and repugnant, and the *poſtea ejecit* is well enough. But in *Goldgaine's* Caſe, 1 *Siderf.* the Jury found that *J. N.*

This Action is grounded on two things (*viz.*) the Leaſe and the Ejectment.

N. let to the Plaintiff for five years the 24th of *June Anno* 1650. by force whereof the Plaintiff enters the 24th of *June* 1650. (the Leaſe being to commence *à die datus*) and that *poſtea ſcil.* 24th of *June* 1650. the Defendant ejected him; ſo that the Entry and Ejectment was ſuppoſed before the Leaſe, and Judgment was againſt the Plaintiff for this Defect. The Council of the contrary ſide ſtood much upon the Caſe of *Adams* and *Gooſe*; but *per Cur'* that Caſe differs from this; for in *Adams*'s Caſe it appeared to be, that he entred by force of the Leaſe, and was poſſeſſed thereof till he was ejected; but in this Caſe he entred the 24th of *June*, which was before the Leaſe commenced; and Judgment was given, 1. Becauſe he ſaid, he entred the 24th of *June*, and ſo was a D iſſeiſor. 2. Becauſe the Declaration is contrary in it ſelf. And *Clifford*'s Caſe, *Dyer* 89. *a.* and *Green* and *Moody*'s Caſe were cited. *Bridgman* ſaid, He found no reaſon for *Adams* and *Gooſe*'s Caſe, *Yelv.* 182. *Davis* and *Pardy. Cro. Jac.* 97. *Adams* and *Gooſe Siderf. p.* 8. *Goodgaine* and *Wakefeild.*

Virtute cujus & iiſdem die & anno he ejected him, how conſtrued.

Ejectione Firme of a Leaſe of *H. P.* 22 of *May* 20 *Jac.* of, &c. *Hab. à primo die Maij* for three Years, *virtute cujus* the Leſſee entred and was poſſeſſed *quouſque poſtea ſcil. eiſdem die & anno* the Defendant ejected him. It was aſſigned for Error, that *iiſdem die, &c.* refers to the firſt day of *May*, which is *ultimum antecedens*, and then the Ejectment is alledged before the Leaſe made, ſo the Declaration not good; but *per Cur'* the Allegation of the firſt day of *May* is but for the

the beginning of the Term; and the Declaration being *quod virtute dimiſſionis*, he entred *poſtea iiſdem die & Anno*, &c. that refers to the day of the Leaſe made, otherwiſe he cannot be poſſeſſed *virtute dimiſſionis*, and Judgment was affirmed in the *Exchequer Chamber*, *Cro. Jac.* 662. *Rutter* and *Mills*.

The common Miſtake has been (as is obſervable in our Book-Caſes) in laying the Leaſe to be *à die datus*, and the Entry the ſame day, which is a Diſſeiſin not purged by the Commencement of the Leaſe; for where an Intereſt paſſeth [*a*] is *excluſive*, and ſo the Entry the ſame day was before the Leaſe was to commence, and is a Diſſeiſin; but where no Intereſt paſſes, as in Caſes of Obligations, *Contra*. In *Douglas* and *Shank's* Caſe. *Cr. El.* 766. the Plaintiff declares of a Leaſe for years *Habend' à die datus, virtute cujus dimiſſionis* he entred, and was poſſeſſ'd until he was ejected by the Defendant. Not guilty pleaded. The Declaration is ill, becauſe the time of the Entry is not alledged; for if he entred at the day of the Demiſe, he is a Diſſeiſor, and the Action not maintainable; the ſtrongeſt ſhall be taken againſt the Plaintiff (*viz.*) That he entred the day of the Leaſe made, and that is not ſupplied by the words *virtute cujus*; but no Judgment was given, becauſe two againſt two: yet in *Dyer* 89. in *margine* it's ſaid, becauſe he did not aver *in facto*, that he entred after the day of the date (for the Leaſe doth not commence till the next day) that Judgment was arreſted *abſente Popham*. And another caſe is there cited, *M.* 44. or 42.

Virtute cujus.

Virtute cujus how taken.

El. B. R. in *Ejectione Firme* upon a Leaſe made to commence at *Michaelmas*, and the Plaintiff declares, That he, *virtute dimiſſionis*, &c. And it was moved in Arreſt of Judgment, becauſe he ſaith not, he entred after *Michaelmas*. And *Dyer* 89. was cited, and *Gaudy* and *Fenner* held it ill; but *per Popham* it is aided by the Statute of *Jeofayls*, becauſe it is Form only, and the Demiſe is the Subſtance; and *per Popham* after *Michaelmas* he is Termor by the Continuance of the Poſſeſſion, *quod Fenner* and *Gaudy negaverunt*. But in *Wakely* and *Warner's* Caſe Ejectment was brough in *Ireland*, and Judgment *pro Querente*. It was aſſigned for Error that the Plaintiff ſhews a Leaſe made to him to commence at a day to come, *virtute cujus* he entred, and was poſſeſt until ejected by the Defendant, and ſhews not when he entred, either after or before the day at which the Leaſe commenced; *ſed non allocatur*, becauſe he ſaid *virtute cujus*, &c. But by *Lea* Chief Juſtice, if he had ſaid *prætextu cujus*, it had been otherwiſe, *Moor* 466.

Virtute cujus & prætextu cujus he entred.

Commencement.

Ejectment of a Leaſe made the 12 of *Dec. Habend' à primo die.* On Not guilty, the Jury find a Leaſe made in *hæc verba*, which was dated *primo Decemb. Hab.* from henceforth, but delivered the 12th of *Decemb.* and the Queſtion was, Whether this be according to the Declaration? It was objected, That from the day of the Date, and from henceforth are ſeveral Commencements, for the one begins the day it was ſealed, the other the day after, but *per Cur'* they are all one, being a Computation of time from the time paſt,

paſt, and both ſhall be pleaded to begin from the day of the Date, when the Leaſe is afterward ſealed another day. But if he declares of a Leaſe the firſt of *December*, *Hab' à die datus*, the Ejectment cannot be alledged the ſame day; but if the Leaſe be made the firſt of *Decemb. Hab.* henceforth, the Ejectment may be alledged the ſame day. So was the Caſe of *Oſborn* and *Ryder*: Ejectment on a Leaſe made 1 *Jan.* 3 *Jac. Hab. à die datus*, and the Ejectment was the ſame day, and ruled to be good; tho' the *Hab.* is as much as to ſay, from the day of the Date; but *per Cur'* the Date is the time of the Delivery, and it differs from the day of the Date; wherefore the Ejectment alledged *poſtea* the ſame day is good enough, *Cro. Jac. p.* 258. *Lluellyn* and *Williams.* And *p.* 135. *Oſborn* and *Ryder.*

Habend. à die datus expounded.

Ejectione Firme of a Leaſe dated the 6th of *December* 17 *Jac. Hab. à die datus*, upon Evidence the Leaſe was ſhewed, and was dated the 6th of *Decemb.* 19 *Jac. Hab. à die confectionis*, the Plaintiff was Nonſuited, *Cr. Jac. Scavage*'s Caſe.

The Plaintiff declares upon a Leaſe made the 10th day of *October Hab.* from the 20th day of *Novemb.* for five years; the Queſtion was upon a ſpecial Verdict, Whether this was a good Leaſe or not. Judgment was arreſted. It ſhall not begin from the time of the Delivery; but it's an uncertain Limitation, and cannot be known what *November* he meant, laſt paſt, or next enſuing. But the Law will reject an impoſſible Limitation, as from the 31ſt of *Septemb.* becauſe it cannot

Uncertain Limitation of the Commencement of the Leaſe.

be any part of the Parties Agreement. The Declaration was, *Quod cum J. H.* by his Indenture bearing date the 20th of *May*, 32 *Eliz.* had let to him an House, and shews not when the Lease was made; for he doth not shew any day of the Delivery, *per Cur'* it's good: For it shall be intended to be delivered at the day of the Date, *Mod. Rep. p.* 180. 3 *Leon. p.* 266. *Knivet* and *Cope.*

No day of the Delivery shewed.

Variance.

In Ejectment of the Manor of *D.* containing 250 Acres, be it more or less, with Letters of Attorney reciting, Whereas *J.* the Lessor had made a Lease of a Manor containing 250 Acres, and Authority to make Livery according to the recited Lease, *per Cur'* the Variance is fatal, and the Plaintiff was nonsuited, 3 *Keb.* 691. *Smith* and *Talbot*, *M.* 18 *Car.* 2.

In what Vill.

Plaintiff declares, That *P. C.* by Indenture *apud S.* let unto him an House and 20 Acres of Land by the Name of all the Tenements in *S.* After Verdict Judgment was Arrested, because it was not alledged in what Vill the Tenements are, and the naming of the Vill in the *Pernomen* is not material, *Cr. El.* 822. *Gray* and *Chapman.*

Per nomen.

50 *Hobert* 89. *Rich* and *Shere.* Declaration was, That at *E.* in *Com' prædict'* he did demise one Messuage, four Gardens, Two hundred Acres of Land, Eighty Acres of Pasture called *East-Dizard* in the said County. On Not guilty the Plaintiff had Judgment; it was Error, because the Plaintiff in his Declaration did not shew in what Town, Parish, Hamlet or Place the said Tenement called *East-Dizard* lay; and Judgment was reversed in the *Exchequer-Chamber.* De-

Declaration was of a Leaſe of Serjeant *Hele*, That he, the 16th of *January*, 44 *El.* by Indenture dated the 2d of *January*, demiſed, *&c.* it was moved, That the Declaration was not good, becauſe it is that he demiſed the 16th of *Jan.* by Indenture dated the 2d of *Jan.* and he does not ſay *primo delibat'* the 16th of *Jan.* for otherwiſe it ſhall be intended to be delivered the day it bears date. But *per Cur'* it's good; for tho' a Deed ſhall be intended to be delivered the day it bears date, unleſs the contrary be ſhewed, yet when it's ſaid, he demiſed ſuch a day by Indenture dated ſuch a day before, it muſt be neceſſarily intended it was not delivered the ſame day it bears date, but upon the day of the Demiſe, as it is alledged, *Cro. El.* 890. *Houſe* and *Laxton*. *Cro. El. p.* 773. *Hall* and *Denby*.

When the Leaſe ſhall be intended to be delivered on the day of the Demiſe, and not of the Date.

And the Verdict often aids and intends, that it was delivered the ſame day it bears date, as in *Heaton* and *Hurleſton's* Caſe. The Declaration was, Whereas *J. S.* by Indenture the 9th of *June* 19 *Jac. dimiſiſſet*, &c. *Habend' terminum prædict' à die datus ſigillationis Indenturæ prædictæ* for three years; *virtute cujus* the Plaintiff the 10th of *June* 19 *Jac.* entred, and was poſſeſſed until, *&c.* and Verdict *pro Quer'* on Not guilty, *per Cur'* when the Verdict has found him guilty upon the Declaration, and the Ejectment is alledged according to the Declaration, it may well be intended, that the Indenture bore date, and was ſealed and delivered the ſame day mentioned in the Declaration of the Leaſe, tho' it was objected, That neither

ther the day of the Date, nor of the Sealing and Delivery of the Indenture are mentioned, and so the Declaration uncertain; but Judgment *pro Querente*, *Cro. Jac.* 646. *Heaton* and *Hurlestone*.

Virtute cujus & prætextu cujus be entred; the difference between them.

Now in *Wakely* and *Warren*'s Case, tho' the Plaintiff does not shew in his Declaration when he entred, either after or before the day on which the Lease commenced, yet it's good enough; because he saith, the Lease to him made, was to commence at a day to come, *virtute cujus* he entred, and was possest until, *&c. aliter* had it been, if he had said *prætextu cujus*, 2 *Rolls Rep.* 466. *Wakely* and *Warren*.

Now the Judges favour Declarations in Ejectment, as may be seen, 1 *Ventr.* 136. The Plaintiff declares in Ejectment, That *J. S.* demised to him *per quoddam Scriptum Obligatorium*, &c. *Habend' à die datus Indenturæ prædictæ*; *per Cur'* the Writing shall be intended an Indenture, tho' it be called *Scriptum Obligatorium*, and every Deed obligeth; but if it shall not be intended Indented, then the Lease shall begin presently, as if it had been made from the 4th of *September*.

But a Declaration was of a Lease *Hab. à die datus Indenturæ prædictæ*, and does not speak of any Indenture before, and the Declaration was adjudged naught. But *Ejectione Firme* of a Lease made the 20th of *August Hab.* from *Michaelmas* then last past *ante datum hujus Indenturæ*, and neither shewed the Indenture nor the Date thereof, and *per Cur'* it's well enough. The Addition *ante datum Indenturæ* shall be void, the other being

ing good, and the beginning of the Leaſe appearing certain enough, *Hetley* 63. *Brady* and *Johnſon. Cro. El.* 606. *Darrel* and *Middleton.* *Et poſtea* how expounded.

Ejectione Firme of a Leaſe made the 21ſt. of *Octob.* 4 *Jac.* & *quod poſtea ſcilicet eodem* 21 *die Octob. Anno tertio ſupradicto* he ejected him: And the Addition of an Year, which was not mentioned before, and which is repugnant to that day which was mentioned, is idle, and ſhall be taken for null, & *poſtea* the ſame day ſhall be good enough, *Cro. Jac.* 154. *Brigate* and *Short.*

Error was aſſigned, for that the Plaintiff did Count of the Leaſe of the fourth part of an Houſe in *N.* in four parts to be divided, by force of which he entred in *tenementum prædictum*, and was *inde poſſeſſionat'* till the Defendant did eject him *de tenementis prædictis*, whereas he ought to ſuppoſe his Entry into the fourth part, and the Ejectment of the fourth part, *ſed non alloc'*; for the Entry and Ejectment ſuppoſed *de tenementis prædictis* ſhall not be intended of the intire Tenement, but of the fourth part of the Houſe, according to his Declaration, *Cr. El.* 286. *Rawſon* and *Mainard.* Ejectment of the 4th part of an Houſe in 4 parts to be divided, and declares *de tenementis prædictis.*

Ejectment for Tythes not ſaying by Deed, Judgment was reverſed, 2 *Keb.* 376. *Angell* and *Rolf.*

The Declaration was of ſeveral Meſſuages in the ſeveral Pariſhes of St. *Michael*, St *James*, St. *Peter* and St. *Paul*, and that part of the Premiſſes lay in the Pariſhes of St. *Peter* and St. *Paul*; but that there is no Pariſh called

called the Parish of St. *Peter*, nor none called the Parish of St. *Paul*; *per Cur'* the Copulation (*Et*) shall be referred to that which is real, and hath existence, *ut res magis valeat*, to make them both one Parish; and the words, several Parishes, is supplied by the other Parishes aforenamed, *Hardr.* 336. *Ingleton* and *Wakeman*.

By Coheirs or Coparceners.

Quod demiserunt.

Declaration by Coparceners, *Quod dimiserunt* is good; therefore *Molliner* and *Robinson*'s Case, *Moor* 682. where the Lease was made by two Coparceners, and it was declared, *Quod dimiserunt*: To which it was excepted, that the Lease is the several Lease of each of them for his Moiety, which was there ruled a good Exception, is not Law, 2 *Brownl.* 207. *Cro. El.* 615. 2 *Keb.* 192. *Moor* 682.

Coheirs declare by the Lessee of a Lessee, and why.

And now Ejectments in such Cases are by the Lessee of a Lessee of the whole by many Coheirs, which is by reason of the Uncertainty of the part claimed by the Lessors; and *per Cur'* a Lease of all parts warrants the Lease of all, 2 *Keb.* 700.

By Tenants in Common.

If Two Tenants in Common joyn in a Lease for years to bring Ejectment, and Count *quod dimisissent*, it's naught, for it is a several Lease of their Moieties, and they must declare, *Quod cum* one of them dimised the one Moiety, and the other the other Moiety, 1 *Brownl.* 13. *Cr. Jac.* 166. *Mantley*'s Case.

If

If one Tenant in Common take the whole Profits, the other has no Remedy by Law againſt him; for the taking the whole Profits is no Ejectment, but if he drive away the Cattel of the other Tenant in Common off the Land, or not ſuffer him to enter and occupy the Land, this is an Expulſion, and he may have *Ejectione Firme* for the one Moiety, and recover Damages for the Entry, but not for the mean Profits, 1 *Inſtit. p.* 199. *b.*

By Baron and Feme.

The Plaintiff declares of a Leaſe made to him by Baron and Feme generally, and does not alledge it to be by Deed; it was a great Queſtion in our Books, whether this be good or not; but now it's ruled to be good by many Precedents, 2 *Rep.* 61. *Wiſcot's* Caſe.

By Joyntenants.

C. and *R.* and *W.* Daughter to *R.* are Joyntenants for years; *W.* lets her part to *C.* and *C.* and *R.* joyn in this Leaſe of the entire Land to the Plaintiff for three years. *Popham* and *Fenner* held, That this Leaſe well warrants the Declaration; for upon the matter they both let the entire, and upon this general Count it is good. *Yelverton* and *Williams è contra*, becauſe the Count ſuppoſeth they both let the entire as Joyntenants; for ſo it is intended by the general Count

Count, which appears to be falſe, for they two let two Parts joyntly, and the one of them having a third Part, as Tenant in Common, lets that only, and ſo the Declation ought to have ſhewed the Truth and the Special Matter. And becauſe it is difficult, they uſe in ſuch Caſe to make a Leaſe, and the Leſſee to make a ſecond Leaſe, and the ſecond Leſſee to declare generally; and ſo all the matter ſhall come in Evidence. *Fleming*, before whom it was tryed by *Niſi priut*, over-ruled it, that this Declaration was well maintained by the Leaſe, and the Jury gave a Verdict according to his Opinion, *Cro. Jac. p.* 83. *Jordan* and *Steere*.

Two as Joynt-tenants, and one as Tenant in Common, demiſe the Commons, in ſuch Caſes how to declare.

Upon a Leaſe by Tenant for life and him in Remainder.

A. Tenant for life, Remainder to *B.* in fee, they both by Indenture joyn in a Leaſe to the Plaintiff; *Per Cur'* this is the Leaſe of *A.* during his Life, the Confirmation of *B.* and after the Death of *A.* it is the Leaſe of *B.* and the Confirmation of *A.* And becauſe the Plaintiff in Ejectment had counted of a joynt-Leaſe by *A.* and *B.* it was adjudged againſt him, 6 *Rep.* 15. *Treport's* Caſe.

Verdict.

So is the Caſe in *Popham p.* 57. upon a Demiſe by *Dorothy Pool* and *Robert Smith*, it was thus on a Special Verdict: *Dorothy* was Tenant for Life, Remainder to *Smith* in Fee, and they being ſo ſeiſed, made the Leaſe in the Declaration, *Per Cur'* the Leaſe found *per* the Verdict doth not warrant the Leaſe alledged in the Declaration; for during *Dorothy's*

Dorothy's Life it's her demiſe, and not the demiſe of *Smith*, but as his Confirmation for that time; for he had nothing to do to meddle with the Land during the Life of *Dorothy*, and after her death it ſhall be ſaid to be the demiſe of *Smith*, and not before, *Poph.* 57. *King* and *Berry*.

By a Corporation.

The Plaintiff declares upon a Leaſe to him made by the Preſident, Fellows and Scholars of *St. John*'s Colledge, *Oxon.* and in the Concluſion he doth not ſay, *hic in Curia prolat'*, *Per Williams* it is not good. The Ejectment Leaſe being made by a Corporation, they ſealed the Leaſe and delivered it by their Attorney, having a Letter of Attorney from them to deliver the ſame; they cannot do this in any other manner than by their Attorney, 1 *Bulſtr.* 119. Lord *Norris*'s Caſe.

Hill. 36 *El. Carter* and *Cromwel*, in *Ejectione Firme*, the Plaintiff counts *per* Leaſe made by the Warden of *All ſouls* Colledge in *Oxon.* And Exception was taken, becauſe the name of Baptiſm of the Warden was omitted, but adjudged there need not; the difference is where a Corporation is ſole Perſon, as Biſhop there may be his Name, *aliter* aggregate. *Dyer* 86. *Marg.*

Ejectment was brought on a Demiſe of a Corporation, not ſaying by Deed, *per Cur'* Judgment ſhall not be arreſted for this on Judgment by *cognovit Actionem* at the Aſſiſes, but it ſhall be intended after this as well as after a Verdict.

Upon

Upon a Leaſe by Commiſſioners of Bankrupt.

Commiſſioners of Bankrupt had aſſigned the Land in Queſtion to the Leſſor of the Plaintiff, which Indenture was afterwards inrolled, but the Declaration was of a Demiſe made after the Indenture and before the Inrolment; and whether that Demiſe were ſufficient to intitle the Leſſor of the Plaintiff, was the Queſtion in *Perry* and *Bowe*'s Caſe; *Per Cur'* it is not ſufficient. *Vide le caſe*, 2 *Ventr.* 360. *Perry* and *Bower.*

By Copyholder.

If a Leaſe be found made by a Guardian or Copyholder, ſuch a Leaſe will maintain the Declaration, tho' their Leaſes are void againſt the Lord and Infant, *Hardr.* 330. *Wheeler*'s Caſe.

Vide ſupra Tit. Who ſhall have *Ejectione Firme.*

By Adminiſtrator.

He ought to ſhew how the Archbiſhop granted it, either as Ordinary, or by his Prerogative; and therefore Exception was taken to a Declaration in *Ejectment*, becauſe the Plaintiff conveyed his Intereſt by an Adminiſtrator of all the Goods of the Leſſee in *Suſſex* and *Kent*, but ſhews not how the Archbiſhop granted it, either as Ordinary, or by his Prerogative; and this was held by the Court to be a material Exception. But becauſe

Preſidents not to be changed.

becauſe all the Preſidents in *B. R.* and *B. C.* were ſo in general, without ſhewing how, and becauſe they would not change Preſidents, they diſallowed the Exception, *Cro. El. p.* 6. *Dorrel* and *Collins.*

In *Gillam* and *Lovelace*'s Caſe, it was moved in Arreſt of Judgment, That the Declaration (brought by Adminiſtratrix) was not good; becauſe the granting forth Letters of Adminiſtration was in this manner (*viz.*) *Adminiſtratio commiſſa fuit querenti per William Lewin vicarium generalem in ſpiritualibus Epiſc. Rot.* without averring, that at the time of the granting Letters of Adminiſtration, the Biſhop was *in remotis agendis*, for a Biſhop preſent in *England*, cannot have *Vicarium*; but *per Cur'* the Vicar-General *in ſpiritualibus* amounts to a Chancellor; for in the Truth, a Chancellor is Vicar-General to the Biſhop. 2. The Declaration is not *Epiſcop. Roff. loci illius ordinarii*, but *per Cur.* all the Preſidents are ſo, and in a Declaration ſuch Allegation needs not, but by way of Barr it is neceſſary. 3. The Plaintiff declares of Ejectment, and alſo *quod bona & catalla ibid. invent. cepit*; and in the Verdict the Damages for the Ejectment and Goods are entirely taxed *Quære de hoc.* 1 *Leon. p.* 312. *Gilham* and *Lovelace*, Vicar-General.

Ejectione Firme was brought of a Leaſe of Tythes, and ſhews not that it was by Deed, and ruled to be ill, becauſe Tythes cannot paſs without Deed, *Cr. Jac.* 613. *Swadling* and *Peers.*

CHAP.

CHAP. VII.

Where in the Declaration a Life must be averred, and where it need not. Of Delivery of Declarations at or after the Essoyne-day. Declarations when to be entred, as of the same Term where the Copies need not be paid for. Declarations, when amendable or not. Of expressing the Vills where the Lands lie. Of the Pernomen. *Declaration need not be of more Acres than he was ejected out of. Of the Forms of the Declaration,* Vi & Armis *omitted,* Extr. tenet *omitted. The President of Declarations in* C. B. *in* B. R. *in* Scacario. *The Indorsement on the Copy to be left with the Tenant, and what the Tenant is to do thereupon. The Rule for confessing Lease, Entry and Ouster in* B. C. *and in* B. R.

IF one do declare upon a Lease in *Ejectione Firme*, and that by Virtue of that Lease he was in possession of the Lands thereby let to him until that he was ejected by the Defendant, it is supposed that the Lessor who made the Lease to him, was alive at the time of the Action brought, *Pract. Reg.* 110.

The Plaintiff in Ejectment declared of a Lease for three years, if the Wife of the Plaintiff shall so long live, and does not shew that the Wife is yet in Life; yet *per Cur'* this being after a Verdict, is made good by the Stat. 21 *Jac.* of *Amendments* after Examination by the Sheriff. And in *Arundel's* Case

Case, in Ejectment the Plaintiff declares that the Lady *Morley* being only Tenant for life, made a Lease to him for three years, if she should so long live; *virtute cujus intravit & fuit possessionat'* until the Defendant entred upon him, *& illum à firma sua prædicta termino suo nondum finito extratenet*, &c. and he did not averr the Life of the Lady *Morley*. But *per Cur'* this amounts to an Averment; for he saith his Term is not yet ended, which implies she is alive, and the years not expired; and this was after a Verdict. But had it been demurred to, it had been more ambiguous. So *Dyer* 304. in *Ejectione Firme* on a Lease, his Supposition that the person *adhuc seisitus existit*, implies his Life, *Siderf. p.* 61. *Palmer Rep.* 267, 268. *Arundel* and *Mead. Cro. Jac.* mesme case. 2 *Browl.* 165.

It was the Opinion of the Court in *Cro. El. p.* 18. *Higgins* and *Grant's* Case, That if in Ejectment one declares of a Lease by a Parson, he ought to averr his Life; for by his death his Lease is void, but it's now otherwise, 2 *Bulstr.* 79. *Cr. El.* 18. *Higgins* and *Grant.*

Of the Delivery of Declarations, Filing and Entry.

A new Declaration delivered on the Essoyn-day.

The Court, in *Car.* 2. *Snow* and *Cooley's* Case, upon Motion, ordered, That a new Declaration delivered on the Essoyn-day, should be sufficient (the old one being delivered before) the Lessee dying, and the Name was changed, there being sufficient

Notice; and this being the Act of God, shall not prejudice, 1 *Keb.* 755.

The Declaration is delivered after the Essoyn-day, and the Consequence.

If the Declaration in Ejectment be delivered after the Essoyn-day, it is but entred of that Term (and not of the Term before) and the Plaintiff in such case cannot have Judgment the same Term; but if he doth not move the following Term to have Judgment (especially if any Assises intervene) he cannot have it without new notice left at the House of the Defendant, and the Default made at first, 1 *Keb.* 721.

What day the Bill was filed, is examinable, whether after the day of the Lease, tho' it's the same Term.

If the Declaration in Ejectment be of *Michaelmas*-Term, which relates to the first day of the Term, yet it's a matter of Evidence, and examinable what day the Bill was filed, and if it was after the day of the Lease, all is well. On a special Verdict it was moved for the Defendant, That the Declaration was in *Michaelmas*-Term, 2 *Jac.* 2. and the Demise is laid to be the 30th of *October*, 2 *Jac.* 2. and so after the Term began. Note, the Declaration cited an Original, and an Original was produced, *Teste* 2. *Nov.* which was after the Demise; and the Prothonotaries informed the Court, That this was frequently allowed, and that no *Memorandums* of the Originals bearing *Teste* within the Term, was used to be made upon the Record, *Sid. p.* 432. *Prodger's* Case. 2 *Ventr. Tonstale* and *Broad.*

* If the Owner prays to be made Defendant, the Declaration to be entred as of the same Term, but no new Imparlance.

It is the Course of the Court in *Ejectment*, if the *Owner of the Land comes in and prays to be Defendant, the Declaration shall be entred as of this Term, altho' it were of the last Term, against the casual Ejector; but yet being

being by favour of the Court admitted, he shall have no new Imparlance besides that which the casual Ejector had. And by *Hide* there is difference between the Tenant in Possession, who is Defendant *ex debito* on his Prayer, *contra* of *J. S.* who is only concerned in Title, 1 *Keb.* 706. *Roch* and *Plumpton.*

If the Declaration filed be paid for, they need not pay for the Copies, and so a Trial at Bar shall not be hindred for want of payment of the Copies, 2 *Keb.* 805. Where Copies of the Declaration need not be paid for.

I find a Rule of Court to change the year, thus:

ſt. Mich. 13 Car. Ordinat eſt per Curiam nono die Octob qd quer' narrationem ſuam in intratione inter partes de Termino St. Trin ult intrat in Anno dimiſſionis emendavit Et ubi per miſpriſionem Clerici allegavit dimiſſionem fieri duodecimo die Aprilis Anno undecimo Caroli fieri debuit Anno duodecimo Et quer' ſolveret Def. miſs per Magiſtrum Gulſton taxand pro emendatione illa ex motione Magiſtri Boon.

Leſſee for three years makes a Leaſe for five years in Ejectment to try the Title, and the Jury on ſpecial Verdict doubt whether the Defendant be guilty for 3 or 5 years; *Per Cur'* the Declaration is ill, and the Plaintiff can have no Judgment; *Per Hale* the Leaſe is good only for three years, and the Defendant ſhall be guilty for no more, elſe the Plaintiff would recover *Terminum prædict'*, Leaſe not warranted by the Declaration.

Declaration.

which is five years, but no Judgment can be for three years, being not warranted by the Declaration, *Tr.* 27 *Car.* 2. *B. R. Rowe* and *Williamſon.*

Mr. Levett's *Caſe of the* Inner-Temple.

Sir *Roger Puleſton*, Kt. Plaintiff.
Sir *Peter Warburton* and others, Defendants.

Ejectment *upon the Demiſe of* John Levet *and his Wife, wherein the Plaintiff declares that* John Levett *and* Margaret *his Wife, the* 10*th of* April 1697. *demiſed to the Plaintiff* Habend. *from the* 25*th day of* March *then laſt paſt for five years.*

Argument.

Argued at the *King's Bench* before Lord C. J. *Holt*, &c.

THIS was tried at the Bar, and a Verdict for the Plaintiff; and the Defendants have moved in Arreſt of Judgment, for that the Demiſe is laid the 10th of *Apr.* 1697. which is not yet come, whereas it ſhould be 1696. which the Plaintiff hath moved to amend, and the ſame ought to be amended, *&c.* for theſe Reaſons, wherein I ſhall only apply my ſelf to the Statute of the 16 and 17 of King *Charles* the Second *Cap.* 8. which I humbly conceive hath not been ſufficiently ſpoken to in this matter, which ſaith, That no Judgments ſhall be ſtaid or reverſed after Verdict for any Miſtake in the Chriſtian Name, Day, Month or Year, by the Clerk, where the right Name, Sirname, Day, Month

Month or Year in any Writ, Roll, Plaint or Record preceeding, or in the ſame Roll or Record are once rightly named, but that all ſuch Omiſſions, Variations, Defects, and all other matters of the like nature, being not againſt the right of the matter of Suit, nor whereby the Iſſue or Trial are altered, ſhall be amended by the Records.

That we are within the Benefit of this Statute, I ſhall offer this to your Lordſhip.

The Declaration againſt the caſual Ejector delivered to the Tenants in the Country was right, that expreſſing the Demiſe to be the 10th of *April* 1696. which ought to have been the time mentioned in this Declaration, for all the miſtake was only betwixt *ſeptimo & ſexto*; and there is an Imparlance entred on the Roll in *Eaſter*-Term laſt againſt the caſual Ejector, which is right.

As in all Actions brought by Bill, the uſual Method of proceeding, is to file the Bill or Declaration in the Office; and as all Defects on the Roll are amendable by that, ſo this being brought by Original inſtead of Filing a Bill in the Office, an Imparlance is entred on the Roll, and the Method of proceeding is in the ſame manner, as in the *Common Pleas*, the Iſſue is as much amendable by the Imparlance-Roll as it would have been by the Bill, if the Action had been brought by Bill.

The Objection made to this, is, That tho' Tenants in Poſſeſſion being not all duly ſerved in the Country, the Tenants agree to appear ſo as the Plaintiff would *Puleſtone* and *Goodluck.*

consent to try it at the Bar, and that thereupon there was a new Declaration delivered, which had this Mistake, and seems to inferr, that the former Declaration was waved, and this was altogether a new Proceeding, wherein the Court was misinformed; for there was no new Declaration delivered, and that which the Defendants produced, was a Copy of the Issue only, and proved nothing but that there was a Mistake, which appears by the Roll, and is admitted by the Plaintiff, otherwise we need not this motion.

Now, my Lord, that the Defendants Appearance was to the Declaration delivered in the Country, is plain, for there was no other Declaration delivered, nor was there in any other for them to appeal to; besides, it appears by the Rule wherein it is written *Pulestone* and *Goodluck*, and under that the now Defendants shall be made Defendants in the room of *Goodluck*, and shall confess Lease, Entry and Ouster for the Lands in that Declaration mentioned, and shall receive a Declaration, and plead the General Issue, and insist upon the Title only; and that if the Plaintiff shall become Nonsuit for default of the Defendants confessing Lease, Entry and Ouster, then that Judgment shall be entred against the Defendant *Goodluck*,&c.

Now, my Lord, I would know what Declaration the Defendants were to appear to; it must be a Declaration against *Goodluck*; and what Lease the Defendants were to confess; it must be the Lease mentioned in the

the Declaration againſt *Goodluck*; and what Judgment the Plaintiffs were to have, if the Defendants did not confeſs Leaſe, Entry and Ouſter; it muſt likewiſe be upon the Declaration againſt *Goodluck*.

Now, my Lord, if the Defendants will ſhew a Declaration that was delivered them againſt *Goodluck*, wherein there was this Miſtake, it would be hard upon us; but if they cannot, then the Declaration delivered againſt *Goodluck* is right, and the demiſe they are obliged to confeſs, is the demiſe in that Declaration, and only miſtaken by the Clerk's tranſcribing it.

Now, My Lord, if the Defendants have confeſſed a good and right demiſe, and this hath been tried, then it would be the greateſt hardſhip in the World, if the Court ſhould not let the Plaintiff have the Benefit thereof; and it is plain that the Demiſe the Defendants are by Rule to confeſs, is the Demiſe in the Declaration againſt *Goodluck*. So that, My Lord, if there were no Statute to help it, I take it with Submiſſion, the Court having tried the Fact, ought to make the Record according to the Fact they have tryed.

As to their conſenting to appear for ſeveral of the Tenants that were not duly ſerved, on Condition the Plaintiff would try it at Bar; My Lord, that is an Argument againſt them, and brings us within the Benefit of the Caſe betwixt *Crawley* and *Parr*, where there was a Judgment in Ejectment by Confeſſion, and the Demiſe laid after the Judgment, and amended after a Writ

of Error brought, becauſe it was a Judgment by Warrant of Attorney; for it ſhould not be ſuppoſed that the Defendant gave a Warrant of Attorney to confeſs a void Judgment.

Now, My Lord, the Defendants conſenting to appear, ſhall never be intended to a void Declaration, but to a good Declaration in order to a fair Trial. And, My Lord, we are the more intitled to the Benefit of it, becauſe we are Purchaſors, for we give a Conſideration for it, *viz.* agreed to try it at Bar, and they themſelves opened it ſo.

As to what was objected, That when the Tenants have appeared to this Declaration in Ejectment, and are made Defendants, it is a new Action, and that the Declaration againſt the Caſual Ejector is rejected, and that therefore this defect cannot be amended, though right in the Declaration againſt the caſual Ejector;

I give this Anſwer, that the Declaration againſt this caſual Ejector, is not rejected, but is by the common Rule in Ejectment made part of the Cauſe, inſomuch that if the Plaintiff be nonſuited he ſhall have his Judgment upon that Declaration, and the Return of the *Poſtea* is Warrant for that Judgment; ſo that by the common Rule in Ejectment they are ſo tied together, that it is all but one Action, and the now Defendants are to ſtand in the caſual Ejector's place. But, My Lord, the Words of the Statute are not ſo ſtrict which are in any Proceedings precedenti Now, My Lord, the Declaration in Ejectment is a Proceed-

ing

ing, and it is precedent, and it is within the equitable meaning of the Statute, which intends all Amendments that are by neglect of the Clerk if it appears that they are right in any of the Proceedings, and for that end a Philiſer's Note, tho' no part of the Record hath been ſufficient to amend by.

And, My Lord, the ſame may be ſaid when the Defendant is arreſted by a *Lat. de Placito tranſgr'*, and the Plaintiff declares in Debt or Caſe, and miſtakes the Chriſtian Name Sirname, whether ſhall it be amended by the *Lat.* and whether the *Lat.* ſhall be looked upon to be a Proceeding precedent to the Declaration, becauſe in another Action, and ſo it would be if a Man be arreſted *de Placito tranſgr'*, *ac etiam Bill'*, and the Plaintiff declares in Debt only, this is likewiſe departing from the Writ; but theſe are warranted by the Practice and Courſe of the Court, theſe Proceſſes being made uſe of only to force an Appearance; and the Plaintiff may then declare in Caſe of Treſpaſs or Debt, as he ſees good. Now My Lord, Declarations in Ejectment are the ſame thing, becauſe only made uſe of to force an Appearance, and are by the common Rule in Ejectment become no more part of the ſame Action, than a *Lat.* is. But this, My Lord, we have a full Anſwer to; for the Declaration againſt the now Defendant, is entred on the Roll, and is right.

But with Submiſſion, My Lord, the Declaration is ſufficient to warrant its own Amendment, it being by Original, *viz. Que Johan' Levett & Maria eidem Rogero dimiſer'*

demiser' ad terminum qui nondum præteriit, intraver' & ipsum à firma sua prædicta ejecer'. Now, My Lord, the Count may be amended by the Original, which is, that the Plaintiff's Lessors had before that time demised the Premisses to the Plaintiff for a Term not then past; and if the Count be made of a Demise then in being, it is all the Amendment we desire. But, My Lord, here it may be objected, When must that Demise bear date and commence? Must the Court set a Date and Commencement to Plaintiff's Demise?

To which I answer, That the Commencement is certain by the Declaration, *videlicet*, from the 25th of *March* last, and that must be the 25th day of *March* last before the Term the Issue is entred on, which is from 96. and then the Date of the Demise must be betwixt *Trinity* Term, 96. and the 25th of *March* before, which points directly at the Mistake which is in *Michaelmas*. If the 10th of *Aril* 1697. instead of 1696. and where the Court can by the Record take notice what was intended; it is the same thing as if it had been once rightly named before, and is within the meaning of that Statute, which after the naming of many Mistakes, hath these general words, and all other Mistakes of the like nature, which My Lord, must be of no Signification, if this be not the meaning of this Statute.

And, My Lord, as to this being the fault of the Clerk, I need no Argument to prove it, for the matter shews it self; and the Declaration against the casual Ejector being right,

right, proves this the Fault of the Clerk in tranſcribing this wrong, though the Declaration may properly be ſaid to be the Act of the Client, yet that ſhall be intended the Declaration againſt the caſual Ejector, that being the firſt Declaration, and all that is neceſſary for the Client to inſtruct his Attorney in, the reſt only depending on the Forms and Practice of the Court, wherein the Attorney needs no further Inſtructions from his Client.

Now, My Lord, I do admit that the general words in this Statute are reſtrained; that is to ſay, All other matters of the like nature, not being againſt the right of the matter of Suit, nor whereby the Iſſue or Trial are altered. But, My Lord, this Reſtriction hath no relation to the particular defects that were mentioned before, whereof ours is one, but to the general words only; and, My Lord, we are within the intent of theſe general words alſo.

For this Amendment is not againſt the Right of the matter of Suit; for that was whether the Plaintiff's Leſſor had a Title, and that hath been tried and found for the Plaintiff; nor is the Iſſue or Trial altered; for had this been amended before Trial, the Defendants muſt have pleaded the ſame Plea, and the Trial would ſtill have been the ſame. The danger only was at the Trial on the Plaintiff's ſide, whether this was not Cauſe of a Nonſuit, and therefore it was his Buſineſs to have had it amended before Trial for fear of being nonſuited at Trial; but having tried his Cauſe, and the Right found

found with him, he is much more entituled to the Benefit of this Amendment, becauſe it is to ſupport a Verdict; Nay, My Lord, a Verdict that was found according to the Right and Merits of the Cauſe, which all Courts have been always very tender of.

Laſtly, My Lord, I ſhall offer this to your Lordſhip, That the matter we pray to amend, is not matter of Subſtance, yet ought to be amended to avoid Abſurdity.

I muſt confeſs, that if this had been a Demiſe to commence *in futuro*, it would have admitted of a greater Argument; but, My Lord, this is a Demiſe in being at the time of the Declaration, and not yet expired, and ſo much appears by the Record.

My Lord, the Record is an Iſſue of *Trinity* Term 1696. and the Demiſe is laid the 10th of *April*, 1697. *Habend.* from the 25th of *March* then laſt paſt, and the words in the Declaration are *dimiſer'*, in the Writ, and *demiſiſſent* in the Count; and that the Plaintiff entred by Vertue thereof, and was poſſeſſed, and the Defendant ejected him, his Term being not ended, &c. all which the Defendant confeſſes.

This Demiſe muſt be before *Trinity* Term 96. or elſe the words *demiſer'*, *demiſiſſent* are to no purpoſe; and it is impoſſible that before *Trinity* Term 1696. the Plaintiff's Leſſors ſhould have demiſed the 10th of *April* 1697. for that time was not come. But it is poſſible that the 10th of *April*, 1696. the Plaintiff's Leſſors might make a Leaſe dated the 10th of *April* 1697. before the time of the date.

And

And if that be the Conſtruction of it, then this is a Deed from the time of the execution, and the Term commences from the 25th day of *March* before.

Or elſe this being an impoſſible date, muſt be altogether rejected, and then *Trinity* Term and the 25th day of *March* being all the times that are certain in the Declaration, the Confeſſion is that betwixt the 25th day of *March* 1696. and *Trinity Term* following the Plaintiff's Leſſors demiſed, the date being no eſſential part, and then this is a good Demiſe for five Years from the 25th of *March* 1696.

Greater Miſtakes than theſe have been amended after Verdict.

Lees and Sir *Nathaniel Curſon*, Bar. in Ejectment, wherein the Plaintiff's Leſſor being an Infant, the Declaration was, That the Infant demiſed by his Guardian, which was no Demiſe, and the Cauſe being tried at *Staff.* laſt Summer Aſſiſes, the Defendant's Council inſiſted on the Miſtake, and relied thereon, and it being referred by conſent to the Judge, and a Verdict given for ſecurity, the Judge referred the matter to the Court of *Common Pleas*, who amended it, though never right in any of the Proceedings. Mich. laſt.

The Biſhop of *Worceſter*'s Caſe in this Court, where there were five Defendants and but three of them pleaded, and after Verdict amended, and the Verdict was recorded againſt two, that no Iſſue was joyned againſt in the Record of *Ni. pr.* 15 *Car.* 1. *Haſleſoot* and *Cade*, after Verdict the day in Record is altered after Verdict.

Cham-

14 Car. 2. *Camberlain* againſt the Hundred of *Tundring* upon the Statute of *Hue and Cry*, where it was ordered, That the Record both of the Declaration and Iſſue ſhould be amended by the Attornies, and this was before Trial.

Ours is a far ſtronger Caſe; for this Amending, if it had been before Trial, would not have altered the Iſſue, or anywiſe influenced the Merits of the Cauſe.

Now, My Lord, we are intituled to the Favour of the Court, in reſpect we moved this matter before Trial, and were bid by the Court to move it afterwards; and if this had been a fatal matter, the Plaintiff ought to have been nonſuited, which was then inſiſted on by the Defendants, and denied; and ſo the Plaintiff expoſe his Title, paid the Charges of the Jury and other things, which coſt him above 100 *l.* and if he had been nonſuited, was by Rule but to pay Country Coſts, and the Plaintiff's Leſſors are Purchaſors for a valuable Conſideration under a Title of above Sixty years Poſſeſſion. And having now upon a fair Trial, and a full Evidence obtained a Verdict, we hope your Lordſhip will put them in a Capacity of reaping the Fruit of it.

The Judgment in Ejectment is double, one as to his Damages, upon which the Coſts are attendant, and the other as to the Term whereupon his Poſſeſſion depends; and the Plaintiff may take out two Executions, one for his Coſts, and the other for his Poſſeſſion. Now if there be cauſe to ſtay the Poſſeſſion, there is more cauſe to ſtay

Judg-

Judgment as to Damages and Costs, because the Issue hath been fairly tried, and the Defendants have confessed that the Plaintiff was in Possession, and that the Defendants did eject him; now if his Term was not commenced, but his Possession tortious, yet he is not to be turned out by a Stranger that hath no Title, as the Defendants were, the Jury having found against them, and the Damages are for the entring upon our Possession and ejecting us.

But the Court said, It could not be amended, and Mr. *Levet* brought a new Trial and recovered.

Declarations when amendable or not.

Declaration amended after Plea, without paying Costs.

In Ejectment where the Title is material, the Plaintiff amended his Declaration after Plea (but while all was in Paper) in the date of his Action, without Costs paying, 1 *Keb.* 14.

After Verdict and Judgment no Amendment of a Declaration.

After Verdict and Judgment the Declaration cannot be amended, for that might attaint the Jury: As in Ejectment of the Rectory of *H.* and other Tenants, *virtute cujus intravit in tenementa prædicta.* Verdict and Judgment *de Rectoria & Tenementis prædict'*, it cannot be amended; but on such Omission in Judgment or Acts of the Court it were amendable, but not of the Declaration. But in this case the Court conceived it well enough, and that the word *Tenements* includes Rectory,

Aliter in Judgment and Acts of the Court.

(*Tenements*) include a Rectory.

Rectory, whether there be Glebe or not but not ſo of a Mannor, *Hill.* 25 and 26 *Car.* 2. *Bale's* Caſe.

Declaration of an Houſe lying in two Pariſhes, and the Houſe lies in one, it's good.

If the Plaintiff in Ejectment declare of an Houſe lying in two Pariſhes, if the Houſe do lie in either of the Pariſhes, and do not lie in both of them, yet the Declaration is good; for there is certainty enough in it, *Pratt. Reg.* 110.

It muſt be alledged in what Vill the Tenements are.

It muſt be alledged in what Vill the Tenements are; the Plaintiff declares that *P. C.* by Indenture *apud F.* let unto him one Houſe and twenty Acres of Land by the Name of all her Tenements in *S. per Cur'* the Declaration is not good, becauſe it is not alledged in what Vill the Tenements are; for the naming of the Vill in the *Pernomen*, was not material, and ſo *Cr. El.* 822. *Gray* and *Chapman.*

Where the *Pernomen* is not good.

The Plaintiff declares of a Leaſe of one Meſſuage ten Acres of Land, twenty Acres of Meadow, twenty of Paſture by the name of one Meſſuage, ten Acres *Prat.* be it more or leſs; after Verdict a *Nil cap. per Billam* was entred: For upon the matter by the Plaintiff diſcloſed in his own Declaration he cannot have Execution of the Quantity found by the Jury: for in the Leaſe there is not but ten Acres demiſed, and theſe words in Judgment of Law, cannot be extended to thirty or forty Acres, and the rather becauſe the Land demanded by the Declaration, is of another nature than that mentioned in the *Pernomen*; for this goes only to the Meadow, and the Declaration is to the arable and Paſture, *Yelv. p.* 166.

In

In this Action it was moved in Arreſt of Judgment, That the Plaintiff had declared of two Demiſes, (*viz.*) that *J. S.* demiſed ten Acres of Land to him, and that *J. N.* had demiſed ten other Acres of Land to him *Habend.* for the Term of five Years, *&c.* and that he entred into the Premiſſes demiſed to him by *J. S.* and *J. N. in forma prædicta.* After Verdict upon Not guilty for the Plaintiff, it was objected, That in one of the Demiſes there is no certain Term or Eſtate; for the *Habend'* can only be referred to the Demiſe of *J. S.* for that begins a new Sentence; but *per Cur'* the *Habend'* ſhall be a good Limitation of both Demiſes for five Years, and when it is ſhewed that the Plaintiff entred into the Premiſſes demiſed to him *in forma prædicta*, that is an Averment that all was demiſed to him, for that it is *forma prædicta*, 2 *Ventr.* 2: *W.* and *M.*

Forma prædict' how conſtrued.

In *Ejectment* the Plaintiff need not count of the demiſe of more Acres than the Acres out of which he was ejected; and a demiſe may be pleaded of any Parcel without mentioning the entire; as if one demiſe to me two Acres for Term of Years, and I am ejected out of one Acre by a Stranger, Now I ſhall have *Ejectione Firme*, and count that one Acre was demiſed to me, without any mention of the other Acre, 1 *Saunders* p. 268.

Declaration need not be of more Acres than he was ejected.

Where one declares on a fictitious Leaſe to *A.* for three years, and within the ſame Term declares of another fictitious Leaſe to *B.* of the ſame Lands, the laſt is not good; for Treſpaſs for the mean Profits muſt be

One fictitious Leaſe to *A.* and another to *B.* the ſame term, the laſt is not good.

brought in the firſt Leſſee's Name, *ut dicitur.*

As to the Form.

Declaration against two, *expulit.*

Ejectment was againſt two, and the Declaration was *intraverat & expulit*; and it was amended, *Yelv.* 223.

The Omiſſion of *vi & armis* in the Declaration.

Vi & armis are left out in the Declaration, *Cro. El.* 340. *Griffith* and *Williams*'s Caſe, ſaith it is but matter of Form, and it is helped after a Verdict; but in *Cro. Jac.* 36. and *Yelv.* 223. in *Odington* and *Darby*'s Caſe, where *vi & armis* was left out, and Error was brought in the *Exchequer-Chamber*, it was not ſuffered to be amended, but Judgment was reverſed. So *Godb.* 286. and ſo in *Sykes* and *Coke*'s Caſe the Want of *vi & armis* is not helped by a Verdict; but in Error in *B. R.* if upon diminution it be well certified, the Court will amend it, *Godb.* 286. 2 *Bulſtr.* 35. *Cr. Jac.* 306. *Yelv.* 223. *Odington* and *Darby.* 1 *Keb.* 164.

In *B. R.* the Tranſcript of Treſpaſs and Ejectment was *de Placito Tranſgreſſionis & Ejectionis*, omitting *Firme*, it was amended. And in *B. R.* it would be amended in the Record it ſelf before Removal, 1 *Keb.* 106.

The Omiſſion of *Extratenet* in the Declaration.

Exception was taken in *Godb.* 60, 71. becauſe the Plaintiff did not ſay in his Declaration *Extratenet*; but *per tot' Cur'* thoſe Words were not material; for if the Defendant do put out the Plaintiff, it is ſufficient to maintain the Action. So if it be *à poſſeſſione ſua ejecit* inſtead of *à firma ſua ejecit*, it's good; for *ejecit à poſſeſſione inde*, *inde* hath relation to the Farm, *Godb.* 60, 71.

Ejectione

In *Ejectione Firme* the Writ and Declaration were of two parts of certain Lands in *H.* and ſaith not, in two parts in three parts to be divided, and yet it was good as well in the Declaration as the Writ; and this difference was taken *Per Cur'* By intendment and Conſtruction of Law, when any parts are demanded without ſhewing in how many parts the whole is divided, that there remains but one part not divided; as if two parts are demanded, there remains a third part; and when three parts are divided, there remains a fourth part: But if any demand be of other parts in other Form, there he ought to ſhew the ſame ſpecially, as if one demands three parts of five parts, or four parts of ſix, *&c.* 13 *Rep.* 58.

Demand of a part without ſhewing into how many parts divided.

Declaration in Ejectment is *Quod cum* ſuch an one *dimiſit*, it's good here, becauſe he cannot have the Action without a Leaſe; but in Treſpaſs, as Aſſault and Battery, *&c.* it is not ſo. And *Dodderidge* took this difference, Where the thing on which the Action is brought, hath continuance, and where the Action is brought for a thing done and paſt. In *Ejectione Firme* there the Leaſe hath ſtill Continuance, and there ſuch a Declaration with a *Quod cum*, is good, becauſe it is in the Affirmative; but where the thing is paſt, as Battery, it ought not to be with a *Quod cum*, 2 *Bulſtr.* 214. *Sherland's* Caſe.

Declaration in Ejectment with *Quod cum*, is good, not ſo in Treſpaſs.

As for the manner of declaring in reſpect of the thing demiſed, *vid. ſupra titulo, Of what things an Ejectment lies*: To which I ſhall add one Caſe in the *Exchequer. Ejectment*

ment for so many Acres of Meadow, and so many Acres of Pasture, on *Non culp'* the Jury find a Demise *de Herbagio & Pannagio* of so many Acres. *Per Cur'* by the same Reason that an Ejectment lies of a Lease of Herbage, by the same Reason the Plaintiff ought to declare accordingly; and Herbage does not include all the Profits of the Soil, but only part of it, *Hardr.* 330. *Wheeler*'s Case in *Scacario.*

De Herbagio.

Herbage does not include all the Profits of thd Soil.

The Form of a Declaration from a Parson of Rectory and Tenements in *B. R.* with an Averment of the Parson's Life, 1 *Rep.* 149. *Chedington*'s Case.

The Form of a Declaration in Ejectment in the *Common Pleas. Mich.* 16 *Car.* 2.

Tempest.

Midd ss. A. B. nuper de London Gen attachiae fuit ad respondend W. J. de plito quare vi & armis unum Messuagium unum Gardinum decem acras terre tres acras prati & quatuor acras pasture cum pertinentiis in H. que S. W. vid eidem W. dimisit ad terminum qui noudum preteriit intravit & ipsum a firma sua predice ejecic & alia enormia ei intulit ad grave damnum ipsius W. & contra pacem Dom Regis nunc,

nunc, &c. Et unde idem W. p J. S. Attornat suum queritur qd cum predict S. primo die Octobris Anno Regni Dom Regis nunc quinto decimo apud H. predict dimisit prefat W. Tenementa predicta cum pertin habend eid W. & assignat suis a Festo Sancti Michaelis Archangeli tunc ultimo preterito usq finem & terminum quinq annorum extunc prime sequen & plenarie complend & finiend virtute cujus dimissionis idem W. in Tenementa predicta intravit & fuit inde possessionat Et sic inde possessionat existen predict A. postea scilicet eod primo die Octobris Anno Regni dict Dom Regis quinto decimo supradicto vi & armis, &c. in Tenementa pdicta cum pertin que pdict S. pfat W. in forma pdicta dimisit ad terminum pdict qui nondum preteriit intravit & ipsum a firma sua pdicta ejecit ac alia enormia, &c. ad grave damnum, &c. & contra pacem, &c. Unde dicit quod deteriorat est & damnum het ad valentiam decem Librarum & inde pduc Sectam.

Et pdict A. p G. L. Attornat suum ven & defend vim & injuriam quandq, &c. L. Lo. usq Octab Hillarij.

In the King's Bench.

Marc ss. T. H. queritur de Jacobo W. in custod Marc Marese Dom Regis coram ipso Rege existen p eo videlt quod cum H. W. Gen ultimo die Januarij Anno Regni Dom nostri Caroli secundi nunc Regis Anglie, &c. vicesimo, apud B. in Com predice dimisisset concessisset & ad firmam tradidisset pfato T. unum Messuagium & duas Acras Pasture cum pertin scituat jacen & existen in B. pdice habend & tenend tenementa pdicta cum pertin prefato T. & assignat suis a vicesimo quinto die Decembris tunc ult pterit usq plenum finem & terminum quinq annorum extunc prime sequen & plenar & finiend complend virtute cujus quidem dimissionis idem T. in tenementa pdicta cum ptin intravit & fuit inde possessionat quousq pdice Jacobus postea scilt eodem ultimo die Januarij anno Regni dict Dom Regis nunc vicesimo supradice vi & armis, &c. in tenementa pdicta cum pertinen in & super possessionem ipsius T. inde intravit & ipsum T. a possessione sua predice termino suo pdice inde nondum finit ejecit expulit & amovit ipsumq T. a possessione sua pdice extratenuit & adhuc extratenet & alia enormia ei intulit contra pacem dict Dom Regis nunc ad damnum ipsius T. 20 l. Et inde pduc Sectam, &c.

In

In the Office of Pleas in the Exchequer.

Derb ss. A. B. debitor Dom̄ Regis nunc venit coram Baronibus hujus Scacarij duodecimo die Februarij hoc Termino p C. D. Attorn̄ suum & queritur p Billam versus E. F. p̄sent hic in Curia eodem die de plito Transgressionis & Ejectionis Firme pro eo videlt qd cum quidam J. B. secundo die Feb Anno Regni dicte Doñi Regis nunc vicesimo primo apud, &c. (put supra in B. R.) ad damnum ipsius A. decem Librarum Quo minus, &c. Et inde producit Sectam, &c.

A Copy of the Declaration you must leave with the Occupier of the House and Land, with this or the like Indorsement.

J*Ames B.* you may perceive that I am sued for the Messuage and Lands within mentioned, being in your Possession; these are therefore to desire you to defend your Title, or else I shall suffer Judgment to be entred by default.

Or thus.

UNless the Tenant in Possession, or they under whom he claims, do next *Trinity* Term appear to this Declaration, and make him or themselves Defendants thereunto, and by Rule of Court confess the Lease,

Entry and Ejectment, and insist only upon the Title at the Trial, the Defendant in this Declaration will confess Judgment, and Possession will be delivered accordingly to the Plaintiff, and you turned out of Possession.

Your Friend J. D.

To A. B. *Tenant in Possession of the Premisses within mentioned.*

To this the Tenant may appear by his Attorney, and consent to a Rule with the Plaintiff's Attorney, to make himself Defendant in the room of the casual Ejector, and to confess Lease, Entry and Ouster, and at the Trial to stand upon the Title only; or in default thereof Judgment will be entred against the casual Ejector.

If the Tenant in Possession do not appear in due time, and enter into a Rule, as is aforesaid, then upon *Affidavit* made of the Service thereof, and notice given him to appear, the Court upon Motion will order Judgment to be entred against the casual Ejector; for if the Defendant plead nothing to this Action, but let it pass by *Nihil dicit*, the Judgment cannot be had upon a common Rule, as in Actions of Debt, and such like, but by Motion of the Court, because it is to alter Possession.

No Judgment against the casual Ejector but by motion of the Court.

What is to be done after the Declaration delivered.

After the Declaration delivered, the Person whose Interest is concerned, ought to retain an Attorney, who is to give his Client's

Client's Name to the Plaintiff's Attorney, that ſo he may be made Defendant inſtead of the caſual Ejector; and then a Rule is to be entred by Conſent, as follows:

Robinſon. *Paſ.* 15 *Car.* 2. *Regis.*

D. verſus *M.* in Ejectione Firme de terris & tenementis in *H.* in Com' *M.* ex dimiſſione *E. P.*

Ordinat eſt p Curiam ex aſſenſu J. H. Attornat querē & J. K. Attornat p T. W. de W. in Com E. pdict Yeom quod idem T. admittatur defendens qui indilate comparebit p Attorn ſuum pdict & recipiet narrationem & plitabit adinde generalem exitum hoc Termino & ad Triationem ſuperinde habend idem T. comparebit in ppria perſona ſua aut p ejus Concilium vel Attornat Et cognoſcet dimiſſionem intrationem & actualem expulſionem vel quod in defectu inde intretur judicium verſus Def. G. M. caſualem Ejectorem ſed parcatur ulterior proſecutio verſus eum quouſq; pdict T. in aliquo pmiſſorum defalt fecerit Et ex conſimili aſſenſu ulterius ordinat eſt per Cur quod pdict T. nullum capiet advantagium verſus querent p ejus non proſecutione ſuper Triatione occaſionat p hujuſmodi defaltam ſed quod pdict T. ſolvet querenti cuſtagia Prothonotar p inde taxand Et ulterius ordinat eſt quod dimiſſor querentis ſit onerabilis cum ſolutoine

lutione cuſtagiorum defendent per Cur aliquo modo taxand vel adjudicand.

The like in *B. R.*

Die Lune prox' poſt Craſt' Aſcenſionis Domini, 23 Car. 2. Regis.

Ordinatum eſt ex aſſenſu ambarum partium & eorum Attornat qd W. H. qui clamat titulum Meſſuagio in queſtione fiat Def. & compebit inſidiate ad Secc quer & impoñ commune Balium & recipiet narrationem in plito Tranſgreſſionis & Ejectionis Firme & plitabit adinde non eulp' & ſuper triatione exitus cogñ dimiſſion intration & actualem Ejectionem & ſtabit ſuper titulum tantum alie judicium intretur per defale verſus modo querene Et ſi ꝑdict W. H. ſuper triatione exitus illius non cognoſc dimiſſion intrakon & actual ejec' p qd quer ꝓſequi ulterius non poteſt quod tunc nul miſs ſive cuſtag ſuper tali non ꝓnos adjudicentur Et ulterius ordinat eſt qd ſi veredict redditum fuerit p ꝑdict W. H. vel ꝓdice quer non ꝓnos ſoret ꝓpter aliquam aliam cauſam p qñ non cognoſc dimiſſion intrakon & actualem ejectionem ꝑdict quod tunc le Seſſor quer ſolveret talia cuſtag W. H. Def. qualia p Cur adjudicata fuerint p Cur'.

An

An Affidavit *in Ejectment to move for Judgment against the casual Ejector.*

Inter { A. S. *Quer'* & B. C. *Def.* } *de Terris & Tenementis in* R. *in Com'* H. *ex dimissione* J. H.

T. S. maketh Oath, That he this Deponent on *Thursday* the —— day of ——last past did deliver unto *J. D.* Tenant in Possession of the Premisses in question, a true Copy of the annexed Declaration, with an Indorsement or Superscription thereupon, to this effect, *viz.* J. D. *You may perceive by this Declaration, that I am sued as Casual Ejector for the Land, and Tenements within specified, in your Possession (whereunto I claim no Title) I do therefore hereby give you timely Notice, that unless you appear and defend your Title this next ——Term, I shall suffer Judgment to pass against me by Default, whereby you will be turned out of Possession. Your Loving Friend,* C. R. Dec. 12. 1679. Which said Indorsement or Superscription this Deponent did then read to the said *T. D.* and acquainted him with the Contents thereof.

Note, It is good Service to deliver the Copy to the Wife, or to the menial Servant of the Tenant in Possession. If to the Wife, thus (*viz.*) *I did deliver to* Ann *the Wife*; or, if to the Servant, *to* R. W. *the hired Servant of* J. D. *and desired her to acquaint*

her Husband therewith; or him *his Master therewith.*

If there be two Tenants, then say, *I did deliver one Copy of the annexed Declaration to* A. R. *Tenant in Possession of Parcel of the Premisses in question*; *and another Copy thereof to* C. D. *Tenant in Possession of the Residue of the Premisses in question*; *upon which said several Copies was subscribed or indorsed to this effect*, &c. Which said several Indorsements he the said Deponent did read to the said several Tenants, *&c.*

CHAP.

CHAP. VIII.

Of Pleadings in Ejectment. What ſhall be a good Plea in Abatement in this Action. Entry of the Plaintiff hanging the Writ. Entry after Verdict, and before the day in Bank. After Imparlance no Pleading in Abatement, and why. Abate, becauſe he ſhews not in which of the Vills the Land lies. Ejectment againſt Baron and Feme; Baron dies ſince the Niſi prius, *and before the day in Bank. Of pleading to the Juriſdiction. Coniſance not allowable on Suggeſtion, but it muſt be averred or pleaded. How Preſcription to the Five Ports to be made. Ancient Demeſne a good Plea in Ejectment, and why. Of Plea of Ancient Demeſne allowed the ſame Term, and how. Of Pleas* puis darrein Continuance. *Entry* puis darrein Continuance *pleaded at the Aſſiſes is reaſonable; the Conſequence of a Demurrer to this Plea. Releaſe from one of the Plaintiffs in Writ of Error, whom it ſhall bar. Accord with Satisfaction pleaded in Ejectment. Aid prier, and why the Defendant ſhall not have Aid of the King,* aliter *of a common Perſon; But a Writ not to proceed* Rege inconſulto *allowed. Recovery and Execution in a former Action pleaded in Bar. Bar in one* Ejectione Firme *how a Bar in another.*

THE General Iſſue in *Ejectione Firme* is now ſetled by Rule of Court to be Not guilty, tho' formerly the Defendant might

might have pleaded *Non ejecit*, or any other Title; and therefore tho' this *Chap.* 2. may ſeem needleſs, becauſe by the new Practice, upon Not guilty pleaded, the Title is only to be inſiſted on at the Trial, yet in ſome Caſes ſpecial Pleas may and ought to be pleaded in *Ejectione Firme*, eſpecially in inferiour Courts, which I ſhall firſt treat of, and then give a little touch as to the ſpecial Pleading formerly in uſe in this Action, that ſo the Reader may not be totally ignorant thereof. But firſt,

What ſhall be a good Plea in Abatement.

That the Plaintiff had another Ejectment depending.

Per Cur', It is a good Plea in Abatement of *Ejectione Firme* in *B. R.* that the Plaintiff had another Ejectment for the ſame depending in the Common Bench, *Moor p.* 539. *Digby* and *Vernon.*

Action commenced, and the Term expires pendant the Suit.

In *Ejectione Firme*, if the Term be expired before the Action brought, the Writ ſhall abate, becauſe he ought to recover the Term and Damages; but if he commence the Action before the Term expire, and it expires *pendent* the Writ, there it ſhall not abate, but he ſhall recover Damages, *Dyer* 226.

Entry of the Plaintiff hanging the Writ.

Entry of the Plaintiff hanging the Writ, ſhall abate the Writ.

Entry after the Verdict, and before the day in Bank, is not Error.

In *Williams* and *Aſhet*'s Caſe the Defendant would have pleaded Entry after the Verdict in Abatement of the Writ, but it was held clearly he had not day to plead it, but it is put to his *Audita Querela.* But in *Parkes* and *Johnſon*'s Caſe, in *Ejectione Firme* the Error aſſigned was, That the Plaintiff

tiff after Verdict, and between the day of *Nisi prius*, and the day in *Banco*, had entred, whereby his Bill was abated, and demurred thereupon: *Per Cur'* this cannot be assigned for Error; for it proves the Bill is abateable, but is not abated in *fait*; neither is it material to assign it for Error; for upon such Surmise which goes only in Abatement, the Judgment shall be examined, *Cro. El.* 181. *Asbet's* Case. *Cro. El.* 767. *Parks* and *Johnson.*

The Plaintiff declares of one Messuage and forty Acres of Land in *Stone.* The Defendant imparles till another Term, and then pleads, That within the Parish of *Stone* are three Vills *A. B.* and *C.* and because the Plaintiff does not shew in which of the Vills the Lands lie, he demands Judgment of the Bill, *& quod ob causam prædict' Billa prædicta cassetur.* The Plaintiff demurs, and adjudged for him. For, 1. after Imparlance the Defendant may not plead in Abatement of the Bill, for he had accepted it to be good by his Entry into defence, and by his Imparlance. 2. The matter of the Plea is not good, because the Defendant does not shew in which of the Vills the Messuage and forty Acres lie. And where a Man pleads in Abatement, he ought to give the Plaintiff a better Writ, and upon Demurrer there shall be a *Respondeas* Ouster, *Yelv.* 112. *Tomson* and *Collier.*

Abate, because he shews not in which of the Vills the Lands lie.

After Imparlance no Pleading in Abatement, and why.

Reg. Where a Man pleads in Abatement, he ought to give to the Plaintiff a better Writ.

After Verdict for the Plaintiff (the Question being brought against Baron and Feme) that the Husband was dead since the *Nisi prius*, and before the day in Bank, the Action against the Wife.

Ejectment against Baron and Feme; Baron died continued after *prius*

prius, and before the day in Bank; and whether the Bill ſhould abate in all, or ſhould ſtand againſt the Feme, was the Queſtion; and becauſe it is in Nature of an Action of Treſpaſs, and the Feme is charged for her own Fact, it was adjudged that the Action continued againſt the Feme, and that Judgment ſhould be entred againſt her ſole, becauſe the Baron was dead, *Cro. Jac.* 356. *Rigley* and *Lee*.

Where the Plaintiff by his demand, confeſſeth the Writ abateable.

Ejectione Firme by *J. S.* againſt *N.* and *O. N.* appears and pleads the General Iſſue, and Proceſs continues againſt the other until he appears, and then he appears and pleads an Entry into the Land *puis darrein Continuance. Judgment de Brev'*. The Plaintiff upon this Plea demurs in Law, *Curia adviſare*; and in the interim the firſt Iſſue was found *pro Quer' verſus N.* and the Plaintiff prays his Judgment. He ſhall not have it, becauſe the Plaintiff by Demurrer in Law had confeſſed the Writ abateable; and the Writ by the Entry of the Plaintiff was abated, in as much as the Term is to be recovered, *Dyer* 226. *Nevill's* Caſe.

To the ſame purpoſe is the late Caſe of *Boys* and *Norcliff*.

In *Ejectione Firme* the Queſtion was, if the Entry into the Land after the day of *Niſi prius*, and before the day in Bank, may be pleaded in Abatement; and if ſuch Entry *puis darrein Continuance*, be a Plea in Abatement. Note, this was in Error out of the Common Bench, and held by the Court of the *King's Bench*, that it is not Error, yet entry will not revive the Term, becauſe it's

it's only in Abatement, and there is a Diverſity between this and Death, 1 *Bulſtr.* 5. And it's uſual if the Entry be before the *Niſi prius*, to plead ſuch a Plea at the Aſſiſes, and if it be omitted, the Advantage is loſt; but not ſo in caſe of Death: By Death the Writ is actually abated, there being no time to plead it in Court, but Entry muſt be pleaded *puis darrein Continuance* in Abatement only, *Sid. p.* 238. *Boys* and *Norcliff.* 1 *Keb.* 841, 850. meſme Caſe.

Entry before the *Niſi prius* to be pleaded at the Aſſiſes.

Difference between Entry after Verdict and Death.

Shall not abate by the Death of the Leſſee. *Vid.* 3 *Keb.* 772.

Not abate by the Death of the Leſſee.

Of pleading to the Juriſdiction: Coniſance of Plea, how to be demanded and allowed, and how pleaded.

This Plea was formerly allowed of, and ſo is ſtill in ſome Caſes.

Now every Plea which goes to the Juriſdiction of the Court, ought to be taken moſt ſtrong againſt him that pleads it; and to this purpoſe there is a pretty Caſe.

Regula, for a Plea to the Juriſdiction of the Court.

In *Ejectment* the Plaintiff declares of a Leaſe made at *Hayliham*; the Defendant pleads, That *Hayliham prædict. ubi tenementa jacent*, is within the Cinque-Ports where the King's Writ runs not; and ſo he pleaded to the Juriſdiction of the Court. The Plaintiff reply'd, That the Town of *Hayliham* was within the County of *Suſſex*, *abſque hoc*, that it was within the Cinque-Ports. The Defendant demurs, becauſe he ought to have traverſed *abſque hoc quod Villa de Hayliham ubi tenementa jacent*, is within the Cinque-Port;

Al' Juriſdict'.

Cinque-Ports.

Traverſe.

for the truth was, it was part in the Cinque-Ports, and part in the County of *Suſſex*, and the Land lies in the part which is in the Cinque-Ports; but *per Cur'* the Traverſe is good, and the Bar is naught. The Defendant in his Bar ought to have made his Diſtinction, and every Plea which goes to the Juriſdiction of the Court, ought to be taken moſt ſtrong againſt him that pleads it, and the Traverſe here ought to be to the Town, and not to the *ubi*, which was idle; for the Law ſaid as much, and we do not imagine any Fractions of Towns, *Winch. p.* 113. *Auſtin* and *Beadle. Cro. Jac.* 692. meſme Caſe. *Hutton p.* 74. meſme Caſe.

Note, He who would demand Coniſance of this Plea, ought to ſhew his Warrant of Attorney in Latin, *Sid.* 103. in the Biſhop of *Ely*'s Caſe.

Cinque-Ports.

The Attorney General in *Hales* and *Full*'s Caſe prayed Allowance of the Plea, that the Lands in the Ejectment were within the Cinque-Ports, which the Court granted, there being no Imparlance General or Special, both which affirm the Juriſdiction of the Court; and at the *Venire fac'* the Plaintiff may ſuggeſt the Lands to be within the Cinque-Ports, and have it of Places adjacent within the County, 1 *Keb.* 65,

Ely. Coniſance not allowable on Suggeſtion, but it muſt be averred on Record.

Sir *Edward Turner* in Ejectment, *ore tenus*, ſhewing his Warrant of Attorney, demanded Coniſance for the Biſhop of *Ely*; *per Cur'* it's not allowable on Suggeſtion, which is Cinque-Ports, Ancient Demeſne, *&c.* It muſt be averred on Record; for tho' the Court takes notice that *Ely* is a Royal Fran-

Franchiſe, yet this muſt be ſo averred or pleaded, and may be after Imparlance, when any third Perſon is concerned ſince the new way of Ejectment uſed in *Green* and *Simpſon*'s Caſe, but *Siderfin* is *contra* that it cannot be pleaded after Imparlance, 1 *Keb.* 946. 948. *Sid.* 103.

It muſt be averred or pleaded, and may be, after Imparlance in Ejectment.

The Defendant prayed to be admitted to plead in Abatement, that the Lands in the *Ejectment* are within the Cinque-Ports, and the rather, for that he was made Defendant by the Rule of Court, with a ſpecial Imparparlance (with a *ſalvis omnibus*, &c.) *Per Cur'* let him plead in Chief; unleſs in Ancient Demeſne no ſpecial Plea has been allowed, becauſe the Lord would be prejudiced in a Trial at Common Law, 1 *Keb.* 725. *Hale* and *Uppington*.

Where Coniſance of Plea not allowed of in Ejectment.

In *Hall* and *Hugb*'s Caſe in Ejectment of Lands, part within and part without the five Ports, the Defendant, after Imparlance, pleads in Abatement, That part of the Lands are in the Five Ports, and ſo prays Judgment, *ſi Curia cognoſcere velit*, &c. The Plaintiff demurs, becauſe it does not appear but that the Demiſe was out, and it's tranſitory, and may be laid any where, tho' the Leaſe was actually ſealed in another Place or County; and the Defendant may plead *Non dimiſit*, as well as Not guilty. The Demiſe in this Caſe was laid at *Maidſtone*; *per Twiſden* this being an inferiour Court, they cannot try the Demiſe, which is iſſuable, and the great Miſchief that came in want of Proof of the Demiſe, was the cauſe of introducing the new Rule. In this Plea it was

Part within and part without the Cinque-Ports, and demur.

Where *Non dimiſit* pleaded in Ejectment.

Why the new Rule of confeſſing Leaſe, was introduced.

ſaid, That the Lands were in *F.* parcel of the Cinque-Ports, where time out of mind, the Writ of our Lord the King runs not, and that they of *F.* have always tried, *&c.* this is ill; for the Preſcription ſhould have been annexed to the Five Ports generally, and not to *F.* only; and the Court ordered him to plead in Chief, and to confeſs Leaſe, Entry and Ouſter, or elſe that the Plaintiff take Judgment againſt his own Ejector, 2 *Keb.* 69, 79.

Preſcription muſt be to the five Ports, and not to *F.* only.

1. Whether Ancient Demeſne pleaded, be a good Plea? 2. Whether it may be pleaded after Imparlance?

In *Cro. Car.* 9. it was a Queſtion, Whether Ancient Demeſne may be pleaded after Imparlance. It's reſolved, That *Ancient Demeſne* is a good Plea in *Ejectione Firmæ*, and in Replevin; tho' it was doubted in our Books formerly, but that is fully ſetled in ſeveral Reports. In *Alden's* Caſe, 5 *Rep.* the Defendant pleads, That the Tenements in which, *&c.* were parcel of the Manor of O. in *Com. S. Quod quidem manerium eſt de antiquo Dominico*, &c. and demands Judgment, *ſi Curia hic vult cognoſcere*, &c. The Plaintiff demurs, and *per Cur'* it is a good Plea. 1. Becauſe it's the common Intendment that the Right and Title of the Land will come in Debate in this Action. 2. In this Action the Plaintiff ſhall recover the Poſſeſſion of the Land, and have Execution by *habere fac' poſſeſſionem*, and this Action favours of the Realty: So in *Pymmock* and *Feilder's* Caſe, where

Ancient Demeſne a good Plea in Ejectment, and why.

where the Pleading was nice; the Defendant pleads that the Lands were Ancient Demeſne, and pleadable by a Writ of Right, Cloſe, &c. The Plaintiff ſhews that they were Copyhold Lands, Parcel of the Manor, and entitles himſelf by Leaſe under the Copyholder, and traverſeth, That they were impleadable by a Writ of Right Cloſe; and it was thereupon demurred, 1. Becauſe Copyhold Land, parcel of a Manor of Ancient Demeſne, ſhould be pleadable there, and not at Common Law. 2. Becauſe this Traverſe that they were impleadable, is but the Conſequence of Ancient Demeſne. *Per Cur'* the Copyhold-Lands are as the Demeſnes of the Manor, and are the Lord's Freehold, and therefore not impleadable, but in the Lord's Court, and the Traverſe is well enough taken, 1 *Bulſtr.* 108. *Cr. El.* 826. 5 *Rep.* 105. *Alden's* Caſe. *Stiles* 90. *Cro. Jac.* 559. *Pymmock* and *Feilder.*

Now a Leaſe for years is intended to be taken real in a Recovery, and becauſe a Leaſe for years intended to be recovered in *Ejectione Firme*, it is a good Plea to ſay it is Ancient Demeſne, yet a Leaſe for years is but perſonal in Quality, 2 *Rolls Rep.* 181. *Banifter* and *Eyres.*

Whether Ancient Demeſne is pleadable after Imparlance.

The Defendant imparles in *Ejectione Firme*, and after pleads that the Land is Ancient Demeſne, *&c. & unde intendit quod Curia non vult cognoſcere*, &c. The Plaintiff demurs: *Per Cur'* this Plea is pleadable after Imparlance, becauſe if Judgment be given here the Lord will reverſe it by Diſceit, and the Judgment will be avoidable, and the di-

Regula.

versity is true, *A Man may plead that which is in Bar after an Imparlance, but not that which goes to the Writ*; and this holds in all Cases but Ancient Demesne. 2. The last Conclusion is Surplusage; but if he had begun his his Plea *Actio non*, it had been ill, notwithstanding the Conclusion, *ut supra*. But the Defendant waved his Demurrer without Costs, and pleaded to Issue, if Frankfee, or not: And yet *Hetley* saith, *p.* 117. It was agreed by all, that Ancient Demesne is a good Plea in Ejectment, but not after Imparlance, *Marsham* and *Allen*'s Cas. *Dyer* 210. *in margine*.

Conclusion of Plea.

But now if a Man come in and pray to be made Defendant, and to plead specially Ancient Demesne, he shall do it; and it's now used of Course to plead Dilatories after Imparlance, 1 *Keb.* 361. *Holiday*'s Case. But in 1 *Keb.* 706. by *Windham* the new Defendant (one that prays to be made so) may plead Ancient Demesne after the former Imparlance, because it's not any Ouster of the Court of Jurisdiction. *Cur' è contra.* He ought to plead Not guilty personally, *Roch* and *Plumpton*'s Case. And in 1 *Keb.* 755. *Snow* and *Cooley*. The Court will allow Plea of Ancient Demesne the same Term, contrary to the ordinary Rules in Ejectment. And in *Sutton* and *Courtney*'s Case it was prayed by Council, That the Defendant might have Liberty to plead Ancient Demesne to a Declaration delivered before the Essoyn of this Term, as of last Term, which the Court granted, and ordered him to attend the Scondary to settle the

New Defendant not to plead Ancient Demesne after the former Imparlance.

Plea of Ancient Demesne allowed the same Term,

And how.

the ſaid Plea, which is uſually done by making the Plaintiff deliver a new Declaration, as of this Term, and ſo the Plea cometh *quaſi* before Imparlance, 2 *Keb.* 725.

In *David* and *Lyſter's* Caſe, *Rolls* ſaid Ancient Demeſne is a good Plea after Imparlance; for it goes in Bar of the Action it ſelf, and not in Abatement of the Writ, *Stiles* 90.

Plea puis darrein Continuance.

Releaſe *puis darrein Continuance* before the Juſtices of *Niſi prius*, they cannot take it.

Ejectione Firme was brought for entring into three ſeveral Vills: The Declaration makes mention of no Vill in certain. The Defendant pleads a Releaſe *puis darrein Continuance* before the Juſtices of *Niſi prius*. *Per Cur'* a Man cannot plead a Releaſe at the *Niſi prius* after Iſſue joyned, for ſo none ſhould have Judgment. When this Plea is pleaded, the Juſtices of *Niſi prius* cannot proceed to take the Inqueſt, and to this Plea of the Defendant, the Plaintiff cannot there reply, but he ought to reply in Bank. After Iſſue joyned, and a *Venire fac'* awarded in ſuch a Vill, the Sheriff returns *null tiel Vill*, this is not good; for he cannot return that thing which is contrary to the Iſſue to avoid the Trial, *à fortior'* one of the Parties cannot plead ſuch matter at the *Niſi prius*; the Authority of the Juſtices of the *Niſi prius* is to take the Verdict of the Jury, and no other Plea: And the Juſtices of the *Niſi prius* have no power to amend any Fault in the Declaration; and when the Seſſions end, their Authority ceaſeth. *Vid. Cro. Jac.* 261. *contra.*

contra. 10 *H.* 7. 21. 1 *Buſtr.* 92. *Moor* and *Brown. Yelv. p.* 180. 1 *Cro. Jac.* 261.

In *Ejectione Firme* againſt two, one appears and pleads the General Iſſue, and Proceſs continues againſt the other, who now appears and pleads Entry *puis darrein Continuance* in Abatement of the Writ: Upon which the Plaintiff demurs; and after Iſſue was found for the Plaintiff, he ſhall not have Judgment, for the Demurrer is a Confeſſion of the Entry, and ſhall abate his own Writ; for in this Action the Term is to be recovered, *aliter* if he had imparled. *Vide ſupra* Plea in Abatement, *Dyer* 226.

Demurrer a Confeſſion of the Entry.

Upon a Special Verdict in *Ejectment*, and a day given for Argument, before which the Defendant procures a Releaſe of all Ejectments, and at the day for the Argument, pleaded the Releaſe *puis darrein Continuance*, and good; *aliter* of a Releaſe between the *Niſi prius* and Day in Bank, becauſe there he had no day in Court, nor has he any Remedy but by *Audita Querela*, if the Plaintiff ſued Execution, 2 *Rolls Abr.* 467. *Wykes* and *Bunbury. Cr. Jac.* 646. *Stamp* and *Parker.*

Releaſe pleaded at the day of the Argument.

Ejectment was brought of Lands in *K.* and two other Villages. The Defendant pleads Not guilty; and at the *Niſi prius* pleaded, That the Plaintiff *puis le darrein Continuance* entred into a Cloſe, *parcel' præmiſſorum*, and him expelled; and a Demurrer upon it, becauſe he declared not in which of the Villages the Cloſe lay. *Per Cur'* this Plea is receivable, for it is matter in *fait*, and peremptory to him who pleads it; for as a Releaſe

Entry *puis dar' Cont'* pleaded at the *Niſi prius*, the Plea is receiveable.

leaſe or matter in Bar may be pleaded, ſo may this, and is receivable at the Diſcretion of the Juſtices, if they perceive any Verity therein: So is *Rolls Abr.* 630. *Moor* and *Hawkins. Cr. Jac.* 261. *Yelv.* 180. *Moor* and *Hawkins.* 1 *Brownl.* 145.

In *Ejectione Firme* the Defendant may plead at the Aſſiſes before the Juſtices of *Niſi prius*, That the Plaintiff had entred into parcel of the Land mentioned in the Declaration *puis darrein Continuance*, the Juſtices of *Niſi prius* may accept the Plea, and diſmiſs the Jury; and tho' they do not give any day to the Parties in *Banco*, yet this is not any Diſcontinuance, altho' that the Plea be collateral; for the day of *Niſi prius* and day in Bank, are one day: For the Court in Bank gives day to the Jurors in Bank, *Niſi prius Juſticiarii ad Aſſiſas venerint*, and to the Parties day is given there abſolurely. 2 *Rolls Abr.* 630. *Moor* and *Hawkins.* 1 *Rolls Abr.* 485. Sir *Hugh Brown's* Caſe.

In *Ejectione Firme*, after pleading Not guilty a Releaſe is pleaded *puis darrein Continuance* whereby the firſt Iſſue is diſcharged, which the Court granted. And tho' the Juſtices cannot try it at *Niſi prius*, unleſs they think it but Colour and inſufficient, yet if he think it ſufficient, he muſt ſign a Bill of Exceptions, for the Trial is Error; and ſo *Yelv* 181. And in this Caſe the Releaſe of the Leſſor of the Plaintiff is but Colour: Alſo the Party cannot demur to ſuch Plea; alſo the Agreement to try and ſtand to the Title only, is no Cauſe to over-rule ſuch Plea;

By this Plea, the firſt Iſſue of Not guilty is diſcharged.

Bill of Exception.

Plea; and *per Cur'* the Plea certified hither, was allowed notwithstanding such Agreement being gained after, 3 *Keb.* 67. *Mich.* 24. *Car.* 2. *Carter* and *Haggard.*

Accord and Satisfaction a good Plea in Ejectment.

H. P. brought *Ejectione Firmæ* against *R. C.* and *A.* his Wife, and *A. D.* for an House in *G.* in, *&c.* upon Demise made by *A. H.* the 7th of *April* 8 *Jac.* for five years, and that the Defendant the 10 of *April* in the same year ejected him, *&c.* The Defendant pleads, That after the Trespass and Ejectment (*viz.*) *primo Maij Anno octavo supradicto apud G. prædict' talis inter* R. C. *præfat' H. P. tam de transgressione & Ejectione prædict' quam de omnibus aliis querelis debitis & debatis inter eos ante tunc habitis fact', sive propter al'*, &c. *habebatur concordia*, that in Satisfaction thereof the said *R.* one of the Defendants should pay to the Plaintiff 6 *l.* 10 *s.* at the Feast of St. *Michael* then next ensuing, and that for the true payment of this he shall become bound in an Obligation of 13 *l.* and pleads performance of this, and the Receipt of the said Sum at the said Feast accordingly. And it was resolved, That Accord in this Action is a good Plea, as being in nature of a Trespass. And tho' the Term (which is a Chattel real) shall be recovered as well as Damages, yet it's a good Plea; and Accord and Satisfaction for one shall discharge all the Trespassors and Ejectors. *Vid.* this Case argued,

argued, 2 *Brownl.* 128. 9 *Rep.* 77. *Henry Peytoe's* Caſe.

But now the Rule is to ſtand upon the Title only.

Aid prier; where Aid ſhall be granted in this Action, and in what Caſes not.

The Defendant juſtified as in his Frankte- The Defendant ſhall not have Aid of the King, and why.
nement the Reverſion to the King, and prayed in Aid of the King, *per Cur'* he ſhall not have Aid in this Action, which is as a Treſpaſs upon this Plea; for he needs no Aid of the King to maintain this Plea. So in *Allen* and *Hallowel's* Caſe, the Defendant pleads, That the Queen was ſeized in Fee, and let it to *J. S.* for years by Patent, who let it to the Defendant, and prays in Aid of the Queen; and it was ruled to be no Plea, becauſe he is not immediate Tenant; wherefore a *Reſpondeas Ouſter* was awarded. And in *Bridgman's Rep* 87. it is agreed, That the Defendant ſhall not have Aid of the King, becauſe he is not his immediate Tenant, and ſo no Privity between the King and him. And to the ſame purpoſe is *Anderſon's* Caſe in *Hardreſs's Reports.* The Defendant prayed in Aid of the King's Leſſee for 99 years for his Dutchy Land in truſt for the Queen, as part of her Joynture, and as Bailiff to them; and it was denied by the Court. And upon the General Iſſue it appears not whether the Right will come in Queſtion; and yet it's ſaid in the Counteſs of *Kent's* Caſe, 3 *Jac. B. R.* That in *Ejectione Firme* the Defendant

fendant ſhall have Aid of the King, becauſe by Intendment the Freehold ſhall come in Debate in this Action, 1 *Rolls Abr.* 407, 156. *Bennet's* Caſe. *Cro. El. p.* 374. *Allen* and *Hollowell. Hardr.* 179. *Anderſon* and *Arundel.* 1 *Rolls Abr.* 148.

Defendant ſhall have Aid of a common Perſon.

But Aid lies in *Ejectione Firme* (of a common Perſon) when the Title of the Land is to come in queſtion. And if a Man recover in *Ejectione Firme* againſt *J. S.* who dies, in a *Scire facias* againſt his Heir, the Heir ſhall have Aid of him in whoſe Title his Anceſtor claims, 1 *Rolls Abr.* 161, 162.

A Writ not to proceed (*Regina inconſulta*) allowed.

In *Ejectment* the Defendant pleaded Not guilty, and after Iſſue joyned, the Queen ſent a Special Writ to the Court, reciting, that how the Defendant was Tenant in Tail with divers Remainders over, the Reverſion to the Queen, and that her Reverſion might be prejudiced by this Trial. Wherefore it was commanded then not to proceed to the Trial of this Iſſue, *Regina inconſulta.* And it was a Queſtion much debated, whether this Writ were allowable or not, becauſe it is a perſonal Action only. *Per Cur'* this Writ ought to be allowed (as well as *Aid prier*) becauſe it appears to them, that the Queen may be prejudiced in her Title; and by the Writ there is a Recital of a Title in the Queen; and her Trial of Right is to be diſcuſſed in *Chancery*, where the Queen's Records are to prove her Title; therefore *per Curiam* we ſhall not proceed without a *Procedendo. Vid.* 1 *Anderſ.* 280. *Blofeild* and *Harris. Cro. El p.* 417. *Sale* and *Barrington. Moor* 421. meſme Caſe. *Hardr.* 428.

In ſuch Caſe where the King's Trial of Right to be diſmiſſed.

In

In Treſpaſs for breaking his Cloſe. The Defendant pleads, That before this he had brought *Ejectione Firme* againſt the now Plaintiff, and recovered, and had Execution, *&c.* Judgment *ſi actio. Per Curiam* it is a good Bar, and the Concluſion of the Plea is alſo good. Judgment, *ſi actio*, without relying upon the Eſtoppel, 1 *Leon. p.* 313. *Kempton* and *Cooper*. Recovery and Execution in a former Action pleaded in Bar.

Ejectione Firme was brought againſt *Drake* and five others: *Drake* pleads Not guilty, the other five *quoad* 20 *Acras* plead Not guilty; and as to the Reſidue that long time before, *&c.* the Plaintiff in his Replicat' ſaid, He was poſſeſſed till by the ſaid five Defendants, who pleaded in Bar, he was ejected; and by his Declaration he has ſuppoſed himſelf to be ejected by all the ſix Defendants, and ſo a Departure from the Declaration in the number of the Ejectors: But *Curia contra.* For *Drake* by his ſeveral Iſſue which he has joyned with the Plaintiff upon Not guilty, is ſevered from the other five Defendants; and then when they plead in Bar, the Plaintiff ought to reply to them, without medling with *Drake*. So in *Ejectione Firme* of 20 Acres, the Defendant, as to 10 Acres, pleads Not guilty, upon which they are at Iſſue; and the Plaintiff replies, as to the other 10 Acres, and ſo was poſſeſt until by the Defendant of the ſaid 10 Acres he was ejected; this is good without ſpeaking of the other 10 Acres, upon which the general Iſſue is joyned, 2 *Leon. p.* 199. *Holland* and *Drake*. Several Iſſue.

In this Action not to plead ſpecially without Conſent of the Plaintiff.

It was moved for the Defendant, that he might have Liberty to plead ſpecially in an Action of Treſpaſs and Ejectment, and not generally Not guilty, becauſe there had been matter given in evidence at a former Trial, which ought not to have been. By *Rolls*, if the other will not conſent, you ſhall not plead ſpecially, but proceed according to the Courſe of the Court, *Stiles Rep.* 412.

Defendant not to plead till Coſts aſſeſſed in a former Action was paid, and Security for new Coſts.

Note, The Defendant by Rule of Court, was not to plead till Coſts paid, aſſeſſed in a former Action on Nonſuit, and that another Plaintiff might be named, or that Security be given to pay the Coſts, if the Plaintiff ſhould be Nonſuit again, *Stiles p.* 433.

Bar or Recovery in one Ejectione, *how far a Bar or Recovery in another.*

Bar in one *Ejectione Firme*, how a Bar in another.

It was a Queſtion, Whether a Bar in one *Ejectione Firme* were a Bar in another? And Juſtice *Berkley* ſaid, It was adjudged upon this Difference, That a Bar in one *Ejectione Firme* is a Bar in another for the ſame Ejectment, but not for another and new Ejectment. And in *Godbolt's Rep. Caſe* 128. in Treſpaſs the Defendant pleaded that at another time before the Treſpaſs, he did recover againſt the ſame Plaintiff in *Ejectione Firme*, and demanded Judgment. *Per Cur'* it is a good Plea *prima facie*, and that the Poſſeſſion is bound by it, for otherwiſe the Recovery ſhould be vain and ineffectual. And by *Anderſon*, If two claim one and the ſame Land by ſeveral Leaſes, and the

Recovery in one *Ejectione Firme* a Bar in another.

one

one recovereth in *Ejectione Firme* againſt the other; that if afterwards the other bringeth an *Ejectione Firme* of the ſame Land, the firſt Recovery ſhall be a Bar againſt him. *Per Rhodes*, a Recovery in an *ad terminum qui præteriit*, ſhall bind the Poſſeſſion, *Godb. p.* 109. no. 128. 3 *Leon.* 194.

In Treſpaſs for breaking his Cloſe, the Defendant pleads, before this, he had brought *Ejectione Firme* againſt the now Plaintiff, and recovered, and had Execution, Judgment, *ſi actio. Per Cur'* in 1 *Leon.* 313. *Kempton* and *Cooper*'s Caſe, and 3 *Leon* 194. the ſame is a good Bar, and the Concluſion of the Plea is alſo good, Judgment *ſi actio*, without relying on the Eſtoppel and by two Juſtices it is no Eſtoppel; for the Concluſion ſhall be Judgment *ſi actio*, and not *ſi ſerra reſpond'*, and it was well pleaded. For as by Recovery in Aſſiſe the Freehold is bound, ſo by Recovery in *Ejectione Firme* the Poſſeſſion is bound. And by *Anderſon* a Recovery in one *Ejectione Firme*, is a Bar in another, eſpecially if the party relieth upon the Eſtoppel; and altho' it be in an Action perſonal, and in the nature of a Treſpaſs, yet the Judgment is good. *habeat poſſeſſionem termini ſui*, during which Term the Judgment is in force; and it's no reaſon he ſhould be ouſted by him againſt whom he recovered, for ſo Suits would be infinite; but this grave Advice is now laid aſide, 4 *Leon.* 77. *Spring* and *Lawſon.*

Note, In *Ejectione Firme* againſt two Defendants, one confeſſeth the Action, and the other pleads in Bar *Non Culp'*; *per Cur'*, tho in

2 Defendants, one confeſſeth, the other pleads in Bar, he cannot leave the one, and proceed againſt the other.

in Treſpaſs againſt two, and the one makes Default, and the other confeſſeth the Action, he may well relinquiſh his Suit againſt him who makes Default, and proceed againſt the other which confeſſeth or pleads in Bar, becauſe this Suit is only in point of Damages; but not ſo in Ejectment he cannot relinquiſh his Suite againſt one, and proceed againſt the other; for if ſo, any Man may be tricked, 2 *Bulſtr.* 113.

Expiration of the Term in *Ejectione Firme*, is no Plea, *Latch.* 106.

Upon a Trial at Bar between *Odil* and *Terril*, a Juror was challenged, for that he ſaid to one of the parties, *Provide you to pay, for if I am ſworn, I will give the Verdict againſt you.* And that this is true, the Parties to whom the Words were ſpoken, did offer to depoſe the ſame; and the Queſtion was, if he ſhould be ſuffered to ſwear this, he being one of the parties; and he was allowed by the Court to be ſworn to prove the Challenge good; and for this Cauſe the Triers found him not to be indifferent, and ſo he was withdrawn. Another Juror was challenged in this caſe, for that he had bought Land of one of the parties in the Suit (*viz.*) of the Leſſor, and that the Leſſor did owe to this Juror 10*l.* and notwithſtanding this Challenge the Triers found him indifferent, otherwiſe *per Cur'* if the Juror had owed Money to one of the parties, 1 *Bulſt.* 20, 21. *Odil* and *Terril.*

The Juror had bought Land of the Leſſor.

CHAP.

CHAP. IX.

Of Challenge. What is Principal or not. Of Eliſors. Of Venue. *Where the Pariſh and Vill ſhall be intended all one: Where it ſhall not be* de Corpore Comitatus. *Where the* Venire fac' *is amendable.* Venire fac' *to the Coroners, becauſe the Sheriff is Couſin to one of the Defendants. A* Venire de Forreſt. Venire de Novo *for Baron and Feme.*

BY *Coke* in *Gueſt* and *Bridgman*'s Caſe, it's not a principal Challenge, that the Sheriff is Couſin to the Leſſor in *Ejectment*, for the Leſſor cannot hinder the Action of the Leſſee (this is not Law) 1 *Rolls Rep.* 328. 2 *Rolls Rep.* 181. *Baniſter*'s Caſe. Couſin to the Leſſor.

Venire fac' awarded to the Coroners upon Surmiſe that the Leſſor was Servant to the Sheriff. *Q.* if it be a principal Challenge; if it be no principal Challenge, then is not the Writ well awarded, and is not aided *per Stat.* 32 *H.* 8. *Cro. Jac. p.* 21. *Harebotle* and *Placock.* Leſſor Servant to the Sheriff.

Challenge to the Sheriff, and a *Venire fac'* prayed to the Coroners, becauſe the Sheriff is Couſin to the Plaintiff, and ſhews how; and becauſe the Defendant did not deny it, a *Venire fac'* was awarded to the Coroners, and Judgment was arreſted, becauſe it was not a principal Challenge, and a *Venire de Novo* awarded to the Sheriff, 1 *Brownl.* 130. *Cradock* and *Jones.* The Sheriff Couſin to the Plaintiff.

That a Juror had married the Couſin-german of *A.*

It is not any principal Challenge to a Juror (in *Ejectione Firme*) That he had married the Couſin-german of *A.* who was the Wife of *R.* from whom is deſcended *H.* from whom is deſcended *B.* who have the Reverſion of the Land in queſtion after the Death of his Mother, who is to had an Eſtate for Life; this is not any principal Challenge, becauſe the Eſtate of *B.* does not appear in the Record, and he had not the immediate Reverſion, 2 *Rolls Abr.* 654. *Gabriel Dennis*'s Caſe.

Eliſors.

In the Lord *Brooks*'s Caſe, the Court was informed, That the Leſſor of the Plaintiff, was High Sheriff of the County, and that the Coroner was Under-Sheriff; and it was prayed that that Eliſors might return the Jury, but the Court would not grant it at the Prayer of the Defendant, though the Plaintiff offered to agree to it, it being in a Trial of *Niſi prius*; but had it been in a Trial at Bar, the Court would have granted it; but the regular Courſe is for the Plaintiff to pray it, or elſe the Defendant may challenge the Array at the Aſſiſes; for it is a principal Challenge, that the Leſſor of the Plaintiff is High-Sheriff, or of Kindred to the Sheriff, *Tr.* 1657. *Hut.* 25. *Moor* 470. *Rolls Rep.* 320. 15 *Car.* 2. *B. R. Duncomb* and *Ingleby.*

That the Leſſor of the Plaintiff is High-Sheriff, a principal Challenge.

Eliſors.

In *Ejectment* the Plaintiff ſuggeſteth, that his Leſſor the Sheriff and Coroners were Tenants to a Dean and Chapter, whoſe Intereſt was concerned, and prayed the *Venire fac'* to Eliſors, and had it, being confeſſed by the Defendant, and the Court took it as a prin-

principal Challenge, *Duncomb* and *Inglesby*'s Case.

In *Ejectione Firme* the Array was challenged, becauſe it was made at the Nomination of the Plaintiff, and by Conſent of the Parties, two of the Attorneys of the Court did try the Array. The Trial of the Array is good, either by the Coroners or by two Attornies, *Godbolt* 428. *Williams* and *Lloyd*. 2 *Rolls Rep.* 363, and 131. Challenge of the Array to the Leſſor.

In *Ejectione Firme* on *Non culp'* pleaded, it is not any Challenge to the Array, that the Sheriff is Couſin to the Leſſor of the Plaintiff; for it does not appear that the Title of him in Reverſion, ſhall be in queſtion; for peradventure the Leaſe is not well made, or no Ejectment committed, and he in Reverſion is not any Party to the Action. So in the ſaid Caſe it ſhall not be any Challenge, altho' it appear to the Court by Averment, that this Leaſe was made only in Truſt, and to try the Title of the Plaintiff for the Cauſe aforeſaid. But now in our feigned Ejectments it is otherwiſe, becauſe the Title of the Leſſor is only in Queſtion, 2 *Rolls Abr. p.* 653. Sir *Edward Kempſton* and *Baniſter Cradock*. *Id. ibid.* *Note.*

Ejectment for Lands in *Suſſex* tried at the Bar, the Defendant challenged the Polls for Default of Hundredors, but did not ſhew it for Cauſe, till the Pannel was peruſed. *Per Hale*, Chief Baron, It is againſt the common Courſe to take a Challenge for want of Hundredors, when the Trial is at the Bar, upon a Jury returned at the Denomination of an Officer of the Court where Challenge for Default of Hundredors on Trial at Bar.

there are but four and twenty left by the Parties themſelves. But if this Challenge be taken to the Polls, it muſt be taken preſently, and the ſpecial Cauſe aſſigned (*viz.*) want of Freehold there, *Hardr.* p. 228. Attorney-General and *Pickering* in *Scaccario.*

In *Ejectione Firme* upon a Leaſe made in *G.* of Land in *T.* in *G. prædict'* the *Venue* ſhall not be from *G.* but from *T.* for it ſhall be intended that *T.* is a Vill of *G.* 2 *Rolls Abr.* 620. *Beachamp* and *Sampſon.*

The Leaſe is made *apud Curdworth* of Lands lying in *parochia de Curdworth prædict'*, the Iſſue was *de Vicineto de parochia de Curdworth*: The *Venire* is well awarded. (*prædict.*) is ſuch an Averment as that of neceſſity it muſt be taken that *Curdworth* the Town, and *Curdworth* the Pariſh are all one; and if ſo be the *Venire fac'* is of the one or of the other, it muſt be good: But if the Pariſh be a larger Continent than the Town, *aliter*, becauſe it cannot be intended that more Towns were in the Pariſh, unleſs it were ſhewed on the other ſide; and we are to judge by the Record which proves the Town and the Pariſh to be all one. So in 43 and 44 *Eliz. in Ejectment*, the Leaſe whereupon the Trial was had, was made *apud Abingdon*, of Lands lying in *Burgo de Abingdon prædict.* The *Venire* was *de Vicineto de Burgo de Abingdon prædict.* This is a good *Venire*, for (*prædict.*) makes this by Intendment of Law to be all one, 2 *Buſtr.* 209. *Vale* and *Field.* 2 *Rolls Rep.* 21. meſme Caſe. *Cro. Jac.* 340. meſme Caſe.

In

In an *Ejectione Firmæ*, if the Plaintiff declare of a Leaſe made *apud Ickworth* of Land in *Berry* in *Suffolk*, and Not guilty pleaded, the *Venire fac'* ſhall be from *Berry*, and not from *Ickworth*; for the Iſſue of Not guilty refers to the Ejectment, which was where the Land lies, 2 *Rolls Abr.* 619. *Pell* and *Spurgeon.*

The Iſſue of Not guilty refers to the Ejectment where the Land lies.

The Award upon the Plea-Roll was againſt both Defendants, they both plead *Non culp'*. The firſt Proceſs (*viz.*) the *Habeas corpora* was againſt both, but the *Venire fac'* againſt one of them, only one of them being named in the Trial, and Verdict for the Plaintiff againſt both Defendants. *Per Cur'* the *Venire fac'* was amended after Error brought, becauſe *vitium Clerici*, 3 *Bulſtr.* 311. *Cranfeild* and *Turner.*

Ven' fac' amended.

Ejectione Firmæ of Lands in *D.* and the *Viſne* was from the Pariſh of *D.* and Verdict *pro Quer'*: It was objected as Error, for the *Venue* ought to be from *D.* and not from the Pariſh of *D.* for it may be the Pariſh extended into ſeveral Vills: But *per Cur'* it is well awarded; for *prima facie* they ſhall be intended all one, if it does not appear to the contrary by pleading; and it ſhall not be intended to extend into ſeveral Vills, *Jones Rep.* 205. *Gilbert* and *Parker. Moor* 797, 798, 837.

The Vill and the Pariſh intended all one.

The *Venire fac'* was *de Vicineto parochiæ de Bredon*, which was ill; for the Leaſe and Ejectment are alledged to be at *Bredon*, which ſhall be intended to be a Vill, and the Lands are intended to be at *Workington* (which alſo ſhall be taken to be a Vill) in

the Pariſh of *Bredon*; ſo that it appears to the Court, that there is a Town called *Bredon*, a Pariſh called *Bredon*, and *Workington* a Vill in the Pariſh of *Bredon*, and the Tythes are alledged to be in *Workington* and *Willeſdon* (which alſo ſhall be intended a Vill) in *parochia de Bredon*; ſo that the *Venue* ought not to have been out of the Pariſh of *Bredon*, *Workington* and *Willeſdon*: And though *Workington* and *Willeſdon* are named Hamlets in the *Pernomen*, yet the Court ought to adjudge upon that which is alledged by the Plaintiff in his Count, 11 *Rep.* 25. 6. *Harpur's* Caſe.

Ejectione Firme verſus B. for ejecting him of certain Lands in *Creeting St. Marys*, *Creeting St. Olaves* and in *Creeting omnium Sanctorum*; and the *Venire fac'* was *de Vicineto de Creeting St. Mary*, *Creeting St. Olives* and *Creeting Omnium* omitting *Sanctorum*; the Court blamed the Clerk for his Negligence, *Winch.* 34. *Good* and *Bawtry*.

In the *Venire fac'* one of the Pannel was named *Thomas Barker* of *D.* and in the *Diſtringas Jurat'* he was left out, and *Thomas Carter de D.* put in his place; and at the *Niſi prius Thomas Carter* was ſworn, and with others tried the Iſſue. *Per Cur'* there is difference between a Miſtake in the Name of Baptiſm and in the Sirname; for a Man can have but one Name of Baptiſm, but may have two Sirnames, as *George* for *Gregory*, and being ſworn at the *Niſi prius*, it's a void Verdict, *Cro. El. p.* 57. *Diſplyn* and *Spratt*.

Difference in Law between a Sirname and a Name of Baptiſm.

Ejectione

Ejectione Firme of a Leaſe *apud Denham* in Lands of the Pariſh *de Denham prædict'*; the *Venire* was *de Vicineto de Denham*, it's good enough. The Pariſh and Village are intended to extend, and to be all one, *Cro. El.* 538. *Bedel* and *Stanborough*.

The *Venire fac'* was *ad faciend' Jurat' in placito tranſgreſſionis*, whereas it ſhould have been *in placito Tranſgreſſionis & Ejectionis Firme*, and it was not amended; for tho' *Ejectione Firme* is but a Plea of Treſpaſs in its nature, yet the Actions are ſeveral, and therefore the *Venire fac'* ought to be accordingly, *Cro. El.* 622. *Clerk*'s Caſe.

Ejectione Firme of a Leaſe at *Mockas* in *Lower Mockas*. The Defendant pleads Not guilty, and found againſt him, and it was moved to be a Mis-tryal; for the *Venire fac'* was awarded from *Mockas*, where it ought to have been from *Lower Mockas*, the Iſſue being Not guilty; but if the Leaſe had been traverſed, it had been otherwiſe, *Williams* and *Whitin*.

In *Ejectione Firme* the Plaintiff declares of a Leaſe of Land in *B. Pernomen* of, *&c.* in *B.* C. &c. The *Venue* from *B.* is good, 2 *Rolls Rep.* 479. *Taylor* and *Lenn*.

The Appearance and Iſſue were in *Hill.* 1 *Jac.* and the Bail was *Craſtino Pur'*, and thereupon was the Declaration, and Iſſue, and *Venire fac'* awarded, bearing date the 23th of *January* 1 *Jacobi*, and upon this a *Diſtringas* the 12th of *February*, moved in Arreſt, That the *Venire fac'* was awarded before the Appearance and Declaration to try the Iſſue in the ſame Action, and cannot be

Venire fac' amended.

good. *Per Cur'* it was amendable, for the Roll is the Warrant of the *Venire fac'*, which being variant from it, the *Teste* thereof shall be amended to be subsequent to the Issue joyned. And whereas the *Teste* was the 23th of *January*, which was *Sunday*, it shall be amended, it being but the Fault of the Clerk, and misawarding of Proces, which is aided *per Stat.* 32 *H.* 8. and 18 *Eliz.* *Cro. Jac.* 64. *Dolphin* and *Clark.*

Another Person sworn on the Jury, who was not returned, it's no Error because Estopple.

William Brown of *Bradfeild* was returned upon the *Venire fac'* and *Hab. Corpora*, and *William Brown* of *Metfeld*, who was another Person and not returned, was sworn; yet this cannot be assigned for Error; for it is against the Record, which is, That *William Brown* of *B.* was returned and sworn; and he is estopt to say the contrary, for then every Record may be brought in Question upon such Surmise, *Cro. Jac.* 244. *Bows* and *Cannington.*

A Vill and Parish are intended all one, unless the contrary be shewed. *Vide Cro. Jac.* 150. *Batch* and *Gilbert.*

The Court was moved to change the *Venue* in *Ejectment* laid in *London*, because the Lands in Question did concern the Poor in *London*; and therefore it was supposed they could not have an indifferent Trial. *Per Rolls* the Action is local, and cannot be removed, except you draw it from thence by your Plea, *Stiles Rep.* 395. *Hunslop* and *Johnson.*

Where it shall not come *de Corpore Comitatus.*

In *Ejectione Firme* upon a Lease made at *D.* in *Comitat'* *E.* of Land called *S.* If Not guilty be pleaded, and a *Venire fac'* awarded

de

de Corpore Comitatus E. there not being any Vill named wherein the Land lies, it is erroneous; becauſe this lies in ſome Vill out of which the *Viſne* ought to have come to have tried it, and in ſuch caſe it ought not to come *de Corpore Comitatus*, for this is larger, *Heb. p.* 89. *Rich* and *Sheere.*

Venire fac' awarded to the Coroners, *ita quod* B. one of the Coroners *ſe non intromittat*, becauſe he was Servant of the High-Sheriff, who was Leſſor of the Plaintiff; it was ſaid, the ſame was no Cauſe of Challenge, but the Court conceived it was, being confeſſed, *Moor* 623. *Higgins* and *Spicer.*

In *Ejectione Firme* againſt four who plead Not guilty, if the Plaintiff ſuggeſt that the Sheriff is of Affinity to one of the Defendants, ſhewing how, and upon this prays a *Venire fac'* to the Coroners, and the Defendant does not deny it; and upon this the *Venire fac'* is awarded to the Coroners, it is well awarded. For altho' none of the Defendants may challenge the Array, becauſe the Sheriff is of Affinity to one of the Defendants, yet the Plaintiff ought at the Trial either to challenge the Array, and ſo delay himſelf, or he ought not to try this during the time that he his Sheriff, which would be a great delay, 2 *Rolls Abr.* 668. *Fox* and *Shepheard* in *Exchequer-Chamber.*

Where the Sheriff is of Affinity to the Defendant.

Vide Raymund 572. Conſent may make a Trial had in a foreign County, good.

In *Ejectione Firme* of three Acres of Land in *Forreſta de K. in Com.* &c. If the Defendant plead *Non culp'*, the *Venue* may be *de Vicineto Forreſtæ*, for this is *Lieu conus*, and by

Viſne de Forreſta.

by Intendment, forasmuch as the Defendant had not pleaded this in Abatement, this is out of any Parish or Vill, 2 *Rolls Abr.* 621. *Phillips* and *Evans*.

The Wife found Not guilty, and a Special Verdict as to the Baron, which was insufficient, a *Venire fac' de novo* awarded for both, and why.

In *Ejectione Firme* against Baron and Feme; on Not guilty pleaded, and a *Venire fac'* granted, the Jury find the Wife Not guilty, and find a special Verdict as to the Husband, which Special Verdict is afterwards adjudged insufficient, a *Venire fac' de novo* shall be awarded for both, as well the Wife as the Husband. And upon this new Writ the Wife may be found guilty, because the Record and Issue is intire; and for this their Verdict is insufficient in all, and void, *Vid. infra Tit.* Special Verdict.

CHAP.

CHAP. X.

Of joyning Iſſue and Trial, and Bill of Exception. In what Caſes there ſhall be Amendment.

THE Record of the *Niſi prius* was amended by the Plea-Roll, 1 *Brownl.* 133. *Gaff* and *Randal.*

Iſſue was joyned, the Defendant pleads Not guilty, and it was entred, and the aforeſaid Leſſor likewiſe, where it ſhould have been *& prædict' Querens ſimiliter*, and it was amended. So *& prædict' Thomas ſimiliter*, where it ſhould be *prædict' Johannes ſimiliter*, and it was amended, 2 *Brownl.* 102. *Weeby*'s Caſe. 2 *Rolls Abr.* 199.

The Iſſue was Not guilty, and a *Venire* awarded retornable 3 *Trin.* and the Eſſoyn adjourned by the Plaintiff till *Michaelmaſs*-Term; and at the next Aſſiſes the Plaintiff, notwithſtanding the Eſſoyn, and the adjourning it, procured a *Niſi prius*, by which it was found for the Plaintiff: And *per Curiam* no *Niſi prius* ought to iſſue out in this Caſe, becauſe the Plaintiff himſelf by the adjourning the Eſſoyn, caſt by the Defendant until *Michaelmaſs*-Term, had barred himſelf of all Proceedings in the mean time. And the words in the *Stat. W.* 2. *c.* 27. are, *Poſtquam aliquis poſuerit ſe in aliquam inquiſitionem ad prox' diem allocet' ei Eſſon'*; import, That the Eſſoyn ſhall not be taken at the Retorn of the Proceſs againſt the Jury, altho' the *Stat. W.* 2. *c.* 27.

the Jury be ready at the Bar. But then it was ſurmiſed, that the Defendant was not Eſſoyned; for the Name of the Defendant is *E. H.* and it appeared at the Tryal, that *E. K.* was Eſſoyned, and the Court denied to amend it, and there was no Eſſoyn, and ſo no Adjournment, and the Plaintiff was at large, and Judgment *pro Quer'*. *Note*, No Statute gives Amendment but in the Affirmance of Judgments and Verdicts, and not in Defeaſance of Judgments and Verdicts, 1 *Leon. p.* 134. *Woodel* and *Harel*.

In *Dyer* 89. the Plea was, *quod non ejecit querentem de*, &c. *modo & forma*; it was moved there, that it is not any Plea; and yet *Dyer Vide* 121. *b*.

The Defendant in' any caſe of Miſdemeanour may ſay generally *Non Culp'* or traverſe the point of the Writ, as *ne forga pas, non ejecit, non rapuit, non manutenuit*.

In what Caſe no Verdict ſhall be entred.

In *Ejectione Firme* the Parties were at Iſſue, and by the Order of the Court the Tryal was ſtaid, yet the Plaintiff privily obtained a *Niſi prius*; and the Chief Juſtice being informed thereof, awarded a *Superſedeas* unto the Juſtices of Aſſiſe, before whom, *&c.* and yet the Inqueſt at the inſtance of the Plaintiff was taken, and found for the Plaintiff; and all this matter was ſhewed to the *King's Bench*, and *per Cur'* no Verdict ſhall be entred on the Record, nor any Judgment on it, 2 *Leon. p.* 167. *Feild, Leich* and *Cage*.

Ejectione Firme againſt *Drake* and Five others. *Drake* pleads Not guilty; the others pleads, the Plaintiff replie; and ſo a Demur

mur. *Per Cur'*, ſeeing that one Iſſue in this Action was to be tried between the Plaintiff and *Drake*, and altho' the Plaintiff offered to releaſe his Damages on the Iſſue joyned, and to have Judgment againſt the Five Defendants who had demurred, yet the Court was clear of Opinion, That no Judgment ſhould be given upon the ſaid Demurrer, till the ſaid Iſſue was tried. For this Action is in *Ejectione Firme*, in which Caſe the Poſſeſſion of the Land is to be recovered; and it may be, for any thing that appeareth, that *Drake*, who has pleaded the General Iſſue, has Title to the Land. But if this Action had been an Action of Treſpaſs, there in ſuch Caſe, *ut ſupra*, upon Releaſe of Damages, and on the Iſſue joyned, the Plaintiff ſhall have Judgment preſently, 2 *Leon. p.* 199. *Holland* and *Drake*.

One Defendant pleads Not guilty, the other demurs; no Judgment upon the Demurrer till the Iſſue be tried.

In *B. R.* after Iſſue joyned in *Ejectione Firme*, and the Jury ready to try it, there comes a Writ to the Juſtices that they ſhould not proceed, *Regina inconſulta*, in the nature of *Aid prier*, and it was allowed, *Moor* 421, 583. *Nevil* and *Barrington*.

Writ to prohibit the Trial, *Rege inconſulto*.

A Suit in the Spiritual Court *pro jactitatione Maritagij*, ſtays not Tryal, 1 *Keb.* 519.

Ejectment in *Brecknock-ſhire*, it was tryed in *Monmouth-ſhire* ſince the *Stat.* 27 *H.* 8. it's a Mis-tryal; for *Monmouth-ſhire* was made an *Engliſh* County but in time of Memory by that Statute, and ſo it ought to have been tried in *Hereford ſhire*, *Hard.* 66. *Morgan*'s Caſe.

Stat. 27 *H.* 8. Marches.

Error

Error of a Judgment in *B. R.* in *Ireland* in Ejectment, after Verdict for Lands in the County of *Clare*. It was excepted, that the Verdict was given by a Jury returned by the Sheriff of the Queens County, *Hob. p.* 5. *sed non alloc'*; for the Consent of the Parties to this Tryal was entred upon the Roll, which was not in *Hobart*, but only in a proper Rule of Court, and therefore the Judgment there was reversed, as 1 *Rolls Rep.* 28. *Crow* and *Edwards*; with this accords *Cr. El.* 664. Sir *Thomas Jones* 199. *Devoren* and *Walcott*.

Consent to alter the Tryal entred upon the Roll.

A new Tryal was denied in Ejectment, tho' the Verdict was given contrary to the Direction of the Court in matter of Law, because it was a Tryal, and because it is not final; Sir *Thomas Jones* 224. Earl of *Thanet*'s Case.

New Tryal denied, and why.

Ejectment was brought for Lands in the County of *Clare* in *Ireland*. Issue was joyned on Not guilty, and then there is an Entry on the Roll, *Et super hoc pro indifferenti tria-tione exitus prædict' inter partes prædict' eædem partes ex eorum unanimi Consensu, & Assensu, & Consensu eorum Conciliat' & Attornat'*, &c. *petunt Breve Dom' Regis Vic' Com' Cork dirigend' de Venire fac' duodecim de corpore Comitatus sui ad triandum exitum prædict'. Ideo' præcept' est*, &c. then there is a *Nisi prius* granted to the County of *Cork*, and the Cause was there tried, and a Bill of Exception put in; and on Debate in *B. R.* Judgment was given for the Defendant. The Plaintiff brings a Writ of Error, whether Consent can make this Tryal in a Foreign County

Consent to a Tryal in a Foreign County.

County, good; and *per Cur'* the Tryal is well had, *Raym.* 372. Vicount *Clare* and *Lynch.* *Hob.* 5. 1 *Rolls Rep.* 166, 363. *Palmer* 100.

At the Aſſiſes in *Northumberland* 15 *Car.* 2. a Plaintiff in Ejectment was called and nonſuited, and this entred upon the Record before the *Venire* or *Diſtringas*, &c. was put in, and this appeared by the *Poſtea* produced; and ſo the Juſtices of *Niſi prius* had not power of Nonſuit, for their Power is by the *Hab. Corpus*, and therefore the Court diſcharged the Nonſuit, and gave leave to the Party to proceed again, *Sid.* 64. *Tomſon's* Caſe. Nonſuit at *Niſi prius* diſcharged.

CHAP.

CHAP. XI.

Of joyning Iſſue and Tryal. Where Iſſue in Ejectment ſhall be tried in other County than where the Lands lie. Trial by Mittimus *in the County* Palatine *: Who ſhall be good Witneſſes or not in this Action. What ſhall be good Evidence in this Action. Copy of Deed. Deed cancelled. Conditions collateral. Warranties found by Jury. What is good Evidence in reference to a former Mortgage. Where Probate of Will is ſufficient Evidence, or not. In caſe of Rectory what is good Evidence, and what things the Parſon muſt prove. Ancient Deed. Scyrograph of a Fine and Conſtant Ejoyment. Evidence as to an Appropriation. Depoſition of Bankrupts. Depoſition in* Chancery. *Anſwer in* Chancery. *Tranſcript of a Record. Inrolment of Deed. Doomſday-book. Variance between the Declaration and the Evidence. Demurrer to an Evidence. Exemplification of a Verdict. Where Iſſue in Ejectment ſhall be tried.*

IT ought to be in the County where the Land lies. If *Ejectione Firme* be brought and laid in *Com' D.* for Lands lying in another County, altho' this be by Aſſent of the Parties, and the Defendant pleads Not guilty, and Verdict and Judgment given for the Plaintiff, yet this is Error; for this is againſt the Law, which cannot be altered by Aſſent of the Parties: But upon View of the Record, if it doth not appear to the Court

Court that the Land lies in another County, they will not reverse the Judgment for that Cause. And it was ruled to be Error in the *Exchequer-Chamber* in the Bishop of *Landaff*'s Case. But in Sir *Thomas Jones*'s *Rep. Devoren* and *Walcot*'s Case, it is held, That a Tryal by Consent upon the Roll in other County than where the Land lies, is good in Ejectment, 1 *Rolls Abr.* 787. 2 *Keb.* 260. Sir *Thomas Jones* 199. *Devoren* and *Walcott.*

A Tryal by Consent in other County than where the Land lies, is good in Ejectment.

In an *Ejectione Firmæ* in *London* upon a Lease made of Lands in *Middlesex*, if the Defendant plead Not guilty, this may be tried in *London*, because the Counties may not joyn, altho' the Jury ought to enquire of the Ejectment which was in *Middlesex*, 2 *Rolls Abr.* 603. *Herbert* and *Middleton.*

Tryal in *London* of Lands in *Middlesex.*

But in *Flower* and *Standing*'s Case in *Ejectment*, it was moved in Arrest of Judgment, That the Lease is made at *B.* of Lands in another County, which was moved to be ill, it appearing that the Plaintiff was not in Possession; *sed non allocatur*, for this is matter of Evidence, and it shall be intended it was after Verdict, and so is the common Course, *M.* 20 *Car.* 2. *B. R.*

Moved in Arrest of Judgment, that the Lease was made at *B.* of Lands in another County, and the Plaintiff was not in Possession.

In Ejectment one may not have Priviledge of Tryal of Lands in *Wales* in the *English* County next adjoyning, for they are to be tried in the County where the Land lies, otherwise it is if the King be Party it shall be tried in the *Exchequer*. This Action was brought by one of the Ushers of the *Exchequer* by Priviledge, *Savile* 10, 12.

In the King's Case, Tryal shall be in the *Exchequer*, tho' the Land lie in *Wales.*

Tryal by *Mittimus* in the County Palatine.

Ejectment is brought againſt one in *Cuſtodia* in *B. R.* of Lands in the County Palatine, and the Action was laid in *B. R.* and the Record was ſent down by *Mittimus* from *B. R.* and a ſpecial Indorſement of the *Poſtea*; and thereof one prayed Judgment againſt his own Ejector in an Action of Lands in the County Palatine of *Cheſter*, which the Court granted; becauſe when the Defendant hath pleaded to Iſſue, they may try it by *Mittimus* in the County Palatine, *Redviſh* and *Smith*'s Caſe. *M.* 15. 2 *Car. B. R. Holloway* and *Chamberlen.*

Action on the Caſe on feigned Iſſue out of *Chancery*; *Per Twiſden* Juſtice, the Lands being in the Iſle of *Wight*, and the Jury of *Surrey*, this Tryal is not allowable to try *Conveyata*, or not, this being a Windlace to try Ejectments in another County. But in 1 *Ventr.* 66. a Title of Land was tried out the proper County upon a feigned Wager, whether well conveyed or not (this is the uſual Courſe of Iſſues directed out of *Chancery*) 2 *Keb.* 634. *Meres* Caſe. 1 *Ventris* 66.

Who ſhall be good Witneſſes in this Action, or not.

Truſtee.

It is agreed, That a Truſtee cannot be a Witneſs concerning the Title of the ſame Land, the Intereſt in the Law being lodged in him. But by *Hales* a Truſtee may be a Witneſs againſt his Truſt, 2 *Sid.* 109.

In Ejectment the Plaintiff challenged *B.* a Witneſs to a Deviſe, becauſe he was Truſtee in

in a Will, and had an Annuity; but he having releaſed both before the Suit, the Court held him to be a good Witneſs, or if he hath received it, and tho' it be after the Action brought, *Sid.* 315.

Intereſt in Equity diſables a Man to be a Witneſs, but one who hath an equitable collateral Title may be a Witneſs. Intereſt in Equity.

Pariſhioners may be a Witneſs to a Deviſe by which the Pariſh claims Lands to the Relief of the Poor. Pariſhioners.

Exception was taken againſt a Witneſs produced to prove the Leaſe of Ejectment, becauſe he had the Inheritance in the Lands let; but it was urged by the other ſide, That the Defendant did claim under the ſame Perſon that the Plaintiff did, and ſo the Witneſs was admitted to be ſworn, *Stiles Rep.* 482. *Fox* and *Swann.* Witneſs had the Inheritance.

One Coparcener cannot be Evidence for another in Ejectment, becauſe ſhe claims by the ſame Title, tho' ſhe is not Party to the Suit; but the Daughter of her Siſter may be ſworn; for altho' ſhe be Heir, yet her Mother may give the Lands to whom ſhe will, being Fee ſimple, *P.* 13 *Car.* 2. *B. R. Tiuel* and *Caſtel.* Coparceners.

In Ejectment of Tythes the Plaintiff excepted againſt a Copyholder in Reverſion after an Eſtate Tail, for a Witneſs to prove the Boundary of a Pariſh, and he was ſet aſide for the poſſibility which makes him partial, *M.* 20 *Car.* 2. *B. R. Hitchel's* Caſe. Copyholder in Reverſion after an Eſtate Tail.

Treſpaſs. In Ejectment of the Manor of *S.* on Iſſue out of *Chancery* to try the Number of Acres, the Defendant excepted to a Witneſs that had been a Treſpaſſor, as Servant to my Lord *Lee* in the Lands in Queſtion, an Action being depending: The Court ſet him aſide, and thereupon the Plaintiff was Non-ſuited, *M.* 20 *Car.* 2. *B. R. Tuck* and *Sibley.*

Eſtate at Will. Exception was taken againſt a Witneſs to prove the Execution of a Deed by Livery and Seiſin, becauſe he had an Eſtate at Will made to him of part of the Land, but it was diſſallowed, *vide Mod. Rep.* 21, 73, 74, 107. *Hob.* 92.

Executor of the grant of a Rent. In Ejectment at Tryal at Bar, the Title of the Leſſor of the Plaintiff was upon the Grant of a Rent, with power to enter for Non-payment; the Executor of the Grantor was produced as a Witneſs for the Defendant. It was objected againſt him, That in the Grant of the Rent, the Grantor covenanted for himſelf and his Heirs to pay it, and ſo the Executor being obliged, he was no competent Witneſs, 1 *Vent.* 347. *Cook* and *Fountain.*

The Witneſs Sells part of the Lnd before Tryal. On on a Trial at Bar *per Cur.* If one of the Witneſſes had part of the Lands in Queſtion, and he ſells or diſpoſeth of it after his coming to *London*, or at any time after he had notice of Trial; he ſhall not be received to give Evidence, tho' he ſell *bona fide*, and upon a valuable Conſideration; and althô he himſelf be not Occupier of the Land, nor had been after the Writ purchaſed, but another by his Commandment, the Court will not ſuffer him to be a Witneſs, becauſe

if

if Verdict paſs againſt him, he who acted by his Commandment may charge him in Action on the Caſe; but upon Examination it appering, That the Witneſs claimed an Eſtate for Life by Title *Paramount* both their Titles (*viz.*) Plaintiff and Defendant) he was Sworn, *Siderf. p.* 51. *Wicks* and *Smallbrok*'s Caſe.

Witneſs claimed Eſtate by Title Paramount both there Titles.

Exception was taken againſt a Witneſs to prove Execution of a Deed of Feoffment by Livery and Seiſin; Two Witneſſes were ſubſcribed to prove the Livery and Seiſin, afterwards one of thoſe Witneſſes had an Eſtate at Will, made unto him of part of this Land, and becauſe being produced as a Witneſs, to prove the Execution of the Deed was excepted againſt, becauſe he was a party now intereſted in the Land, and ſo his Oath was to make his own Eſtate good. But *per Cur'* he may well be Sworn a Witneſs to prove the Livery and Seiſin, this being in affirmance of the Feoffment, 1 *Bul.* 203.

One who had Eſtate at Will to prove a Livery.

The Father teſtified a Deed in Perſuance and Affirmance of a Leaſe, made to his Son by himſelf, which the Court allowed, his Intereſt being paſt away, 1 *Keb.* 280. *Jay* and *Ryder*.

Father a Witneſs for the Son.

In Ejectment on Extent, on Mortgage on Trial at Bar. The Defendant excepted to the Plaintiffs Witneſs, becauſe his Father paid a Debt as Security with the Defendants elder Brother for the Defendants Father; but there being no Counterbond, and therefore doubtful in Equity, whether he as Heir could recover any thing againſt the Defendant as Heir, the Court Swore him; but if

he were to let himself into a certain Interst, thô but in Equity, the Court will set him aside, 2 *Rol.* 345. *Vincent* and *Tirrinsharp.*

In what Case Sollicitor, &c. not to give Evidence against his Client.

In Ejectment, one *Baker* who had been Sollicitor for *P.* the Defendant was produced as a Witness, concerning the Rasure of a Clause in a Will supposed to be done by *P.* The Question was, if he ought to be examined about this, because having been Sollicitor, he was obliged to keep his Secrets; but it appearing that B. had made this Discovery to him, about which he was now to give his Evidence, before such time as he had retained him, *Per Car.* He was Sworn, *aliter*, if he had been retained his Sollicitor before. The same of an Attorney or Councellor, 1 *Vent.* 179. *Cutts* and *Pickering.*

What shall be good Evidence in this Action and what not.

There are several Cases in our Books concerning Evidence upon Leases made to try the Title, which I shall not at present meddle with, they being of no great use since the alteration of Practice in this Action; but I shall mention those which are of Dayly use, and principally aim at such Evidence which is allowed, or disallowed as to the proving of Title to Land, without the knowledge of which there are infinite Failures and Non-suits in this Action; and I shall first begin with Matters of Record, and then Matters of Fait, Bills, Answers, Depositions and other Sorts of Evidences, as to Antiquities,

ties, Pedigrees; and what Evidence a Man muſt have to make Title in ſeveral Caſes. And Laſtly, Treat of Demurrers upon Evidence and Exemplifications of Verdicts.

As to Matters of Record.

If a Deed be Pleaded the Party muſt ſhew it in Court; ſo if a Record be Pleaded, it muſt be *ſub pede ſigilli*; but Evidence its not abſolutely neceſſary to ſhew either, if it can otherwiſe be proved to a Jury, as in 1 *Vent.* 257. In Evidence for Lands in Ejectment in Ancient Demeſne, the Court admitted of Evidence to prove a Record to cut off the Intail (which was loſt) and it may be proved to a Jury by Teſtimony; as the Decree in *Henry* the Eighth's time, for Tithes in *London* is loſt; yet it hath been often allowed there was one. And further in this Caſe it appeared, That part of the Land was Leaſed for Life, and the Recovery with a ſingle Voucher was ſuffered by him in Reverſion, and ſo no Tenant to the *Præcipe*; yet in regard the Poſſeſſion had followed it a long time, the Court would preſume a Surrender. Record ſhewed in Court. Long Poſſeſſion.

The Copy of a Record may be ſhewed and given in Evidence to a Jury, for Records are of ſo high a nature, and have ſuch great credit in the Law, that they cannot be proved by any other means than by themſelves, and no Raſure, or Interlineation ſhall be intended in them; and therefore a Copy of a Record being teſtified to be true, Copy of a Record.

is permitted to be given in Evidence; but the ſure way is either to exemplifie it under the great Seal, or at leaſt under the Seal of the Court, 10 *Rep. Leyfeild's* Caſe.

In Ejectment for Lands in *Brecknockſhire*; Upon Not guilty and Tryal there, The Defendant gave in Evidence, a Recovery in a Writ of *Quod ei deforceat*, which is their Writ of Right at the great Seſſions there; and Iſſue being tendered therein, the Defendant produced an Exemplification of the Record under the Seal of the great Seſſions, but not the Record it ſelf. The Plaintiff Demurs to the Evidence, and the Queſtion was, whether the Exemplification maintained the Iſſue or not. It was agreed, That a Sworn Copy of a Record in *Wales* might be given in Evidence, but not an Exemplification, becauſe the Court here ought not to take notice of ſuch an inferior Seal; but if it were Exemplified under the great Seal, it would be Evidence and Proof tho the Record it ſelf were loſt. And yet *Whitehead's* Caſe was, That an Exemplification under the Seal of the Mayor of *Briſtol*, of a Recovery ſuffered there under the Town Seal, ſhould be given in Evidence, tho the Record it ſelf could not be found.

Exemplification.

Note, It muſt be given in Evidence in the like manner as it is to be pleaded, and that is under the great Seal, *Hardreſs* 118, 119, 120. *Henry Olive verſus George Gowin.* And by *Hales*, Exemplification of a Recovery in the Marqueſs of *Wincheſter's* Court, in ancient Demeſne was allowed becauſe it was ancient. One had gotten a preſentation to the Parſonage

Parſonage of *G.* in *Lincolnſhire*, and brought a *Quare Impedit*, and the Defendant Pleaded an Appropriation, and there was no Licence of Appropriation produced, but becauſe it was ancient the Court will intend it; and in an ancient Recovery, they would not put one to prove Selſin of a Tenant in a *Præcipe*, *Mod. Rep.*

Scyrograph of a Fine.

The Scyrograph of a Fine may be given in Evidence. (but not delivered to the Jury, 2 *Sid.* 145, 146.) in a general Iſſue in Aſſize, *Plowd. Com.* 411.

Fine and Non-claim.

Note, If a Fine be given in Evidence with five years Non-claim, the Fine muſt be ſhewed with Proclamations under Seal, and the Scyrograph will not ſerve.

Fine, Recovery.

A Fine or Recovery, may be found by the Jury without ſhewing it under Seal; but they cannot find againſt what is admitted by the Record, *Sid.* 271.

Copy of a Recovery.

The Copy of a Recovery was ſuffered to be given in Evidence, the Recovery it ſelf being burnt, *Mod. Rep.* 117. *Green* and *Proud.*

No Tenant to the *Præcipe* proved.

The Court allowed an old Recovery, thô no Tenant to the *Præcipe* could be proved, but it ſhall be intended, *Cro. Jac.* 455. *Mod. Rep.* 117.

Nothing may be delivered in Evidence to a Jury, but that which is of Record or under Seal, but by conſent, 2 *Sid.* 145.

As to Letters Patents, *vide infra* Deeds. *Dyer* 167. The Jury find the Conſtat of Letters Patents.

Inſpeximus.

One may not ſhew in Evidence to a Jury an *Inſpeximus* of a Deed inrolled in *Chancery*, if

if it be not a Deed of Bargain and Sale inrolled there; for if it be a Deed of Feoffment, the Party muſt ſhew the Deed it ſelf, for the *Inſpeximus* is no matter of Record, *Stiles Rep.* 445. But by *Rolls*, tho' the *Inſpeximus* be the *Inſpeximus* of the Inrolment, and not of the Deed it ſelf, yet if it be an Ancient Deed, it may be given in Evidence.

Inſpeximus.

Conviction of a Recuſant, the Record being burnt, proved in Evidence.

The Earl of——— being a Popiſh Recuſant convict, preſented the Leſſor of the Plaintiff to a Rectory, who was inſtituted and inducted, but the Record of the Conviction was burnt (as was ſuppoſed) in the Fire at the *Inner-Temple*. The Defendant offered to prove it by the Eſtreats thereof in the *Exchequer*, and by the Inquiſition found and returned here of Recuſant's Lands. *Per Hale & tot' Cur'*, in ſuch a Caſe as this a Record may be proved by Evidence, becauſe the Converſion here is not the direct matter in Iſſue; as was Sir *Paul Pinder*'s Caſe in an Action of Trover and Converſion for Goods, the Proof depended upon a *Fieri facias* and a *Venditioni exponat*; and yet in that Caſe, becauſe the *Fieri facias* could not be found upon Record, it was admitted to be proved in Evidence, *Hardr.* 323. *Knight* and *Dawler*.

Fieri fac' proved in Evidence.

Elegit muſt be ſhewed.

But when he that ſues an *Elegit*, brings an Ejectment to try the Title, he muſt in Evidence ſhew the *Elegit* filed.

Tranſcript of a Record, or Inrolment of a Deed.

A Tranſcript of a Record, or Inrolment of a Deed, may be given in Evidence, for they are things to be credited, being made by Officers of Truſt, but Inrolmene of a Deed which needs no Inrolment, is no Evidence.

In

In Ejectment of Lands in the Parish of *Long Hope*; the Defendant pleads that they are part, and held of the Manor of *Long Hope*, which is *Ancient Demesne*; and on Issue thereupon *Doomsday-book* was brought in, by which it appeared, That the Manor of *Hope* is the Land of *W. de B.* who held of the King; which *Per Curiam* doth not maintain the Issue, unless the Defendant had pleaded further, that the Lands are as well known by the Name of *Hope* as *Long Hope*; this Book is the Tryal, and the Court cannot take notice of the same. *Respondeas Ouster*, 1 *Keb.* 520. *Holdy* and *Hodges*. Doomsday-Book.

Matters of Fait.

As for Deeds shewed forth, and given in Evidence, the Learning thereof is excellently delivered in Dr. *Leyfeild*'s Case, 10 *Rep.*

It is a Maxim in Law, That *he which is Party or Privy in Estate or Interest, and he that justifies under him, shall shew the Original Deed to the Court*, for this Reason; because to every Deed two Things are requisite. 1. That it be sufficient in Law, and this is called the Legal Part, and the Judgment of this belongs to the Judges. The other concerns Matters of Fact (*viz.*) if it were sealed and delivered, and this is tried *per Pais*; or whether it be raised or interlined, or upon Limitation, Condition, Revocation, and the like. Therefore it hath been always thought dangerous to permit any upon the General Issue

Deed proved by Copy or Testimony.

Issue to give in Evidence, that there is such a Deed which they have heard or read, or to prove it by a Copy. But in Cases of Extremity, as where Deeds are burnt by Fire; upon the General Issue the Judges will suffer to prove a Deed to a Jury by Testimony.

And what hath been said as to the Legal Part of a Deed, holds as to Letters Patents.

Deed cancelled.

A Deed cancelled by Practice, was allowed to be read in Evidence in Action under that Deed, the Practice being proved, *Hetley* 138.

Lease and Release.

Lease and Release were given in Evidence to intitle the Plaintiff, and they were both named *hæc Indentura*, and were not indented, yet good by *Hales*, *Norf. Assises*, 1668. *Bryan*'s Case. In *Negus* and *Reynell*'s Case, in Evidence to a Jury it was held, 1. That a Proof that there was a Revocation, is sufficient for the Heir, without producing the Deed it self. 2. A Lease recited in the Release, was admitted to be proved by Witnesses to the Release, without shewing the Lease it self, which was imbezelled by the Lessor of the Plaintiff, *P.* 13 *Car.* 2. *B. R.*

And the Copies of Deeds have been admitted in Evidence, the Original agreed to be burnt. So in Ejectment at the Bar, a Copy of a Deed burnt, made by the Witness, to carry about to Council, was allowed for Evidence; so was *Dean*'s Case at *Oxon.* and *Thyn*'s Case. The Testimony of a Witness of the Contents of a Deed burnt, but such

ſuch Witneſs was refuſed at *Lent Aſſizes* by *Windham*, tho' the Deed were in the Adverſaries own Cuſtody, *Mod. Rep. p. 4. M. 21 Car. 2. B. R.*

It is ſaid, That a Copy of a Deed is good Evidence where the Defendant hath the Deed, and will not produce it, *Mod. Rep. 2 Keb. 483. 15 Car. 2. Stroud* and *Hill.*

One claimed under a Leaſe for years of a Prebend, *&c.* and after he claims under a Leaſe from a Nominal Prebendary thereof, founded in the Cathedral Church of *Lincoln*; and he offered (at a Tryal at Bar in Ejectment) to read a Copy of a Leaſe out of the Leiger-Book of the Dean and Chapter of *Lincoln*, but it was diſallowed *per Curiam*; for the Book it ſelf is but a Copy, and a Copy of a Copy is no Evidence, *P. 27 Car. 2, B. R. Cotterel's* Caſe. Leiger-Books and Paper-Books cannot be exemplified, but when offered in Evidence, muſt be produced themſelves, *Hardr. 117, 118.*

Copy out of a Leiger-Book no Evidence.

The Recital of a Leaſe, without ſhewing it, ruled to be no Evidence upon a Demurrer, *Ra. Entr. 318. 1 & 2 P. & M. Rot. 13. B. R.* cited. *Hardr. 119, 120.*

Recital of the Leaſe.

A Copy of the Counterpart of a Leaſe, the Leaſe being Loſt, allowed to be Evidence.

Counterpart of a Leaſe.

Tho' the Seals be broken off a Leaſe, yet the Deed may be given in Evidence, *1 Mod. Rep. fol. 11. Q.* if the Deed be pleadable.

Seals broken off.

A Copy of a Court-Roll may be given in Evidence, where the Rolls are loſt or not loſt, *15 Car. 2. B. R. Snow* and *Cutler.*

Copy of Court-Roll.

For

Difference between pleading a Deed, and giving it in Evidence.

For if a Deed be pleaded, the Party must shew it in Court; but if it be given in Evidence, it is not necessary to shew it, if it can otherwise be proved to a Jury; for Witnesses may prove the Contents of a Deed or Will, and so the Jury may find them, the Deed or Will not being found in *hæc verba*, *Stiles p.* 34. *Wright* and *Pindar*.

A Deed made before time of Memory. Ancient Deed.

A Deed made before the time of Memory, may be given in Evidence, tho' it cannot be pleaded. An ancient Deed is good Evidence without proving or Seal to it, *P.* 17 *Car.* 2. *B. R. Wright* and *Sherrard*.

Will. Probate.

A Will, under which a Title of Land is made, must be shewed it self; and the *Probate* is not sufficient: *Contra*, if it were on a Circumstance, or as Inducement, or that the Will remain in *Chancery* or other Court by Special Order of such Court, 1 *Keb.* 117. *Eden* and *Thalkill.* 2 *Rolls* 678. So is *Brett's*. A *Probate* of a Will by Witnesses for Lands, is not Evidence at Common Law. And nothing can be given in Evidence against the *Probate* of a Will, but Forgery of it, or its being obtained by Surprize, and so it's conclusive, *Raym.* 405.

Bill of Exceptions on the Probate of a Will.

Error was brought of a Judgment in *C. B.* in *Ireland* in *Ejectment*: The Question was upon a Bill of Exception, for that the Justices of the Bench there would not direct the Jury, that the *Probate* of a Will before the Archbishop of *Canterbury* (the Testator dying in his Province) and also the Bishop of *Fernes*, were sufficient and conclusive Evidence, but only affirmed it was good Evidence, leaving it to the Jury. To which the

othe

other Party ſhews in Evidence Letters of Adminiſtration of the Goods under Seal of the Primate of *Ireland*. The Title was for a Leaſe for years in *Ireland*, claimed by the Leſſor of the Plaintiff under the ſaid Adminiſtrator: And Judgment was affirmed *Per Curiam*.

Where Bills, Anſwers, Depoſitions, &c. in Chancery, *ſhall be good Evidence in this Action, or not.*

In *Ejectment* the Defendant that made Title as a Purchaſor under a Deviſee, and ſhewed only a Bill in *Chancery* preferred by the Heir, under whom the Leſſor of the Plaintiff claims againſt the Deviſee, whereby the Will was ſet forth, and confeſſed in the Anſwer. But *per Curiam* it is no Evidence, tho' a Poſſeſſion were proved accordingly in the Deviſee, and that this had been confeſſed by the Plaintiff in a former Tryal, 2 *Keb.* 35. *Evans* and *Herbert*. And yet in 1 *Ventr. p.* 66. A Bill in *Chancery* was ſaid to be given in Evidence againſt the Complainant.

Bill preferred by the Heir againſt the Deviſee, ſetting forth the Will.

On a Tryal in *Ejectment*, it was ſhewed for Evidence, That the Defendant *P.* was guilty of Simony for giving 100 *l. per Annum* to *M.* the Patron; and to prove this they ſhewed a Bond conditioned to pay 100 *l. per Annum* generally: And they ſay, That an Action of Debt was brought againſt *P.* and *P.* had preferred his Bill in *Chancery* to be relieved againſt this Bond, and by it diſcloſed

ſed that it was entred into for the Cauſe aforeſaid. But to that it was Anſwered, That *P.* was preſented by *G.* but it appeared that *G.* acted as a Servant to *M.* the Patron; and it was oppoſed, That this Bill is no Evidence, becauſe it only contains Matter ſuggeſted perhaps by the Council or Sollicitor, without the Privity of the Party. But *per Curiam* the Copy of the Bill ſhall be read as Evidence, for it ſhall not be intended it was preferred without the Privity of the Party, and it being diſcloſed by the Party himſelf; otherwiſe they would not allow a Bill in Evidence, if there be not Anſwer and other Proceedings upon it, *Siderf. p.* 220. Dr. *Crawley*'s Caſe.

Where a Copy of a Bill ſhall be read as Evidence.

But at a Tryal, the Plaintiff to prove his Bond, offered a Bill by the Defendant in *Chancery*, which *Keeling* Chief Juſtice held good Evidence, as in the Parſon of *Amerſham*'s Caſe. Dr. *Crawley*, where a Bill by *P.* a Simoniac, to be relieved againſt his Bond, was admitted againſt himſelf; this being the Drift of the Bill, and not any particular Allegation: But the Court would not allow it.

Where an Anſwer in Chancery *ſhall be good Evidence at a Tryal, or not.*

In a Tryal at Bar between *Mills* and *Bernardiſton*, an Anſwer of *L. M.* ſurviving Truſtee, under whom the Plaintiff claimed, was offered for Evidence; but being after a Conveyance by him, the Court refuſed; but had it been before, it would be good againſt

gainſt all claiming under him. But *Twiſden* denied it, becauſe an Anſwer does not diſcover the whole Truth, and therefore ſhall be only admitted againſt the Party himſelf that made it, and not of one Defendant againſt another, much leſs againſt a Stranger, 2 *Car.* 2. *B. R.* And by *Ley*, *Chamberlain* and *Dodderidge*, a Defendant's Anſwer in an *Engliſh* Court, is a good Evidence to be given to a Jury againſt the Defendant himſelf, but it is no good Evidence againſt other Parties, *Godb.* Caſe 418. 2 *Rolls Rep.* 311. *Berisford* and *Phillips*. And if the Defendant's Anſwer be read to the Jury, it is not binding to the Jury, and it may be read to them by the Aſſent of the Parties, *Godb.* 326.

Anſwer good Evidence againſt the Defendant himſelf, but not againſt other Parties.

An Infant anſwered a Bill in *Chancery* by his Guardian; and it was a Queſtion in *Leigh* and *Ward*'s Caſe in a Tryal at Bar in *Ejectment*, where the Infant was Party, whether that Anſwer could be read in Evidence againſt the Infant? This Queſtion was ſent from the *King's Bench* by Juſtice *Eyres* to the *Common Pleas* to know their Opinion; and *per totam Curiam* it could not be read; for there is no Reaſon that what the Guardian ſwears in his Anſwer, ſhould affect the Infant, 2 *Ventr.* 1 *William* and *Mary*.

Infant's Anſwer by Guardian, not to be read in Evidence againſt the Infant.

Where, and in what Caſes Depoſitions ſhall be read at a Tryal, and where not.

Depoſitions no Evidence, if the Party be alive.

Regularly the *Depoſitions in* Chancery *or* Exchequer, *of a Witneſs, ſhall not be given in Evidence, if he be alive*: But if *Affidavit* be made, that he is dead, they ſhall in a Cauſe between the ſame Parties, Plaintiffs and Defendants, *Godb. p.* 193. Sir *Francis Forteſcue*,

Depoſitions no Evidence, without an Anſwer put in.

Depoſitions taken in *Chancery in perpetuam rei memoriam*, upon a Bill for that purpoſe exhibited, cannot be given in Evidence in a Tryal at Law, unleſs there be an Anſwer put in and produced, *Hardr.* 336. *Raymund. Watts*'s Caſe.

Depoſitions before Commiſſioners of Bankrupts, no Evidence at a Tryal.

Depoſitions taken before Commiſſioners of Bankrupts, ſhall not be uſed as Evidence at a Tryal, altho' the Witneſſes be dead; but Depoſitions taken before the Coroner, with Proof that the Party made them, if dead, ſhall be good Evidence, *P.* 18 *Car.* 2. *Bick* and *Browning*.

Exemplificat' of Depoſitions.

Exemplification of Depoſitions under the Great Seal, 988. whereby a Conveyance made in 986. was loſt and proved: *Per Cur'*, being ſo old, and the Records of the Rolls burnt ſince, it is good Evidence; tho' the Bill and Anſwer were not in it, 2 *Keb.* 31.

In *Ejectment* for Lands in *Kent*, it was held upon Evidence by the Court, and by Advice of other Judges, whom one of the Barons was ſent to conſult, That if one Witneſs be examined for the Defendant *de bene eſſe* to preſerve his Teſtimony upon a Bill

Bill preferred, and before Answer, and upon an Order of Court for his Examination made upon hearing of Council on both sides; and if after Answer the Witness die before he be examined again, he being sick all the while, yet the Examination of such a Witness shall not be read in Evidence, because it was taken before Issue joyned. Examination taken before Issue joyned, no Evidence, *Hardr.* 315. *Brown's* Case.

Divers Depositions in *Chancery* taken *de bene esse*, without Answer of the Defendant, were produced in Evidence; but the Court refused to permit the reading of such Depositions for Default of the Answer; and it was agreed, That the Court is not bound to such Evidence; but the Course in such Case is by Order of *Chancery* to require the adverse Party to admit such Evidence; but this doth not bind the Courts of the Common Law, Sir *Thomas Jones p.* 164. *Poricye's* Case. Depositions *de bene esse*.

Two were made Parties to a Bill, one had Title, but the other does not claim Title, but in his Answer sets forth many things which made for the Title of the other Defendant: And between other Parties in *B. R.* these Depositions were prayed to be admitted in Evidence to prove the same Title; but it was not suffered, because whatever the Defendant saith, he saith it in Defence of himself and partially. And *Chamberlain* Justice said, The Answer of a Defendant is not good Evidence for any purpose but against himself, 2 *Rolls Rep.* 311. *Bernsford* and *Phillips*.

A Voluntary Affidavit made before a Maſter of the *Chancery*, cannot be given in Evidence at a Tryal, *Stiles* 446.

Decree or Decretal-Order.

Decree or Decretal-Order under the *Exchequer-Seal*, which recites the Proceedings; and if it have Bill and Anſwer, allowed to be read, 1 *Keb.* 21. *Trowel* and *Caſtle*.

PEDIGREE.

In *Ejectione Firme* for the Barony of *Cockermouth* and the Lands, *&c.* the Leſſor ſhewed an Inquiſition *in tempore R.* 2. and finds an Intail to *Henry* Earl *Piercy*, and derives his Title under his Third Son, and offers in Evidence *Dugdale*'s Baronage, but it was not allowed.

In *Ejectment* the Earl of *Thanet* makes his Title by a Gift in Tail by King *Edward* II. to *Robert de Clifford*, and the Heirs of his Body; and to prove him to be Heir of the Body of the ſaid *Robert*, he produceth a Chart of his Pedegree; which (deriving him from the ſaid *Robert*) ſhews him to be his Heir. And Sir *William Dugdale* and other Heralds being ſworn, they affirm that the Chart was deduced out of the Recodrs and and Ancient Books in the Heralds Office; but the Court would not allow this for Evidence, without ſhewing the Books and Record out of which they were deduced. And after an Ancient Book was ſhewed by them, which was allowed for Evidence; Sir *Thomas Jones* 224. Earl of *Thanet*'s Caſe.

Office found, is no concluding Evidence, Sir *Tho. Jones* 224.

What

What Matter may or muſt be Pleaded, and what Matter may or muſt be given in Evidence.

Regula.

It is a Rule in Law, in all ſuch Actions wherein one cannot Plead, there the Matter to be Pleaded ſhall be given in Evidence, and found *per* Verdict, but where the Party may Plead the ſame, is to be Pleaded by him. Therefore in *Ejectione Firme*, Treſpaſs, &c. in Action on the *Stat.* 5 *R.* 2. *cap.* 7. and other perſonal Actions, a Collateral Warranty cannot be Pleaded in Bar; but he ſhall have the benefit of it, by giving the ſame in Evidence to a Jury, and the ſame is to be found by Verdict of the Jury; ſo is *Seymor's* Caſe, 10 *Rep.* 97. That Collateral Warranty may be given in Evidence, on Not guilty Pleaded in *Ejectione Firme*, becauſe in that and other perſonal Actions, that may not be Pleaded in Bar, 1 *Bulſtr.* 166, 167. *Haywood* and *Smith.* 10 *Rep.* 97. *Seymor's* Caſe, 1 *Rep. Chudley's* Caſe.

Collateral Warranty given in Evidence.

The Jury may find a Condition to Deſeat a Freehold of Land, altho' it be not Pleaded; but of things in Grant, they muſt alſo find the Deed of the Condition, 21 *Aſſ.* 14.

Condition to deſeat a Freehold found by Jury.

The Jury may find Eſtoppel, which cannot be Pleaded, and Eſtoppels which bind the Intereſt of the Land, as the taing a Leaſe of a Mans own Land, by Deed indented, and the like, being ſpecially found by the Jury, The Court ought to Judge according to the Special Matter, 2 *Rep.* 4. *Goddard's* Caſe.

Eſtopple found by Jury.

What Evidence the Jury ſhall have with them after Evidence given.

The Jury may not carry any other Evidence with them, but what is delivered to them by the Court, and ſhewn in Evidence. Upon Evidence to a Jury, to prove *J.S.* to be Heir to *W. S.* The Court will not accept the Pedigree drawn by an Herald at Arms for Evidence, nor will ſuffer the Jury to have it with them; its but only Information for Direction, *p.* 8. *Jac. B. Plumton* and *Robinſon.*

If an Exemplification comes out of *Chancery*, of Witniſſes there examined upon Oath who are Dead, the Jury ſhall have it with them; not ſo if ſome are Living and ſome are Dead, *p.* 10 *Jac. B. Tomlinſon* and *Croke.*

If after Evidence given to the Jury at the Bar, and they depart, the Solliciter of the Plaintiff come to them and delivers to them a Church Book, to take an Age which was given to them, in Evidence before at the Bar, and their ſhewed to them, and after they found for the Plaintiff; yet this ſhall not avoid the Verdict, becauſe it was no other than what was given to them in Evidence before, *Vicars* and *Farthing's* Caſe.

What

What ſhall be good Evidence to make Title in ſeveral Special Caſe.

A Verdict for the Leſſee is good Evidence for a Reverſion in Ejectment, *Hardr.* 472.

In Ejectment of a Rectory, The Evidence was of the taking of Tithes only, and not Entry into the Gleble, and the Plaintiff was Non-ſuit; ſo it was in *Perry* and *Wheeler*'s Caſe, 1 *Keb.* 368. for a Rectory conſiſts of Glebe and Tithes, *Latch.* 62. *Hems* and *Stroud.*

As to a Rectory, the taking of Tithes only no good Evidence of Ejectment.

A Parſon in the Ejectment of a Rectory, (if he will make out his Title) muſt prove Admiſſion, Inſtitution and Induction; his reading and ſubſcribing the Articles, *&c.* and his Declaration in the Church of his full and free aſſent, and conſent to all the things contained in the Common Prayer; and this muſt be proved to be done within the time limited by the Statute, but he need not to ſhew a Right in him that preſented him, 2 *Keb.* 48. *Siderf.* 221. Dr. *Crawley*'s Caſe.

What things a Parſon in the Ejectment of a Rectory muſt prove.

In Evidence an Inſtitution without Preſentation, or Copy of it was refuſed in Court; albeit, a Preſentation may be made by Parol, but proof muſt be made of it, *ibid.*

Inſtitution without preſentation proved no Evidence.

Admiſſion, Inſtitution and Induction upon the Preſentation of a Stranger, is a good matter to bar him, who had Right in an *Ejectione Firme*, and to put him to his *Quare Impedit*, *Sid.* 221. Dr. *Crawly*'s Caſe.

Evidence as to an Appropriation.

In *Ejectment*. The Defendant had a Leaſe of a Prebend made *in tempore Hen.* 8. and expired; and he now claimed a Leaſe from a nominal Prebendary thereof, founded in the Cathoedral Church of *Lincoln*. The Plaintiff claimed under Letters Patents from King *James* 1. and the Poſſeſſion was according to this Grant; and itwas a Queſtion, if they ought to ſhew how it came to the Crown; but the Poſſeſſion having gone with it, The Court did preſume the Grant to King *James* to be loſt, and Judgment *pro Quer.* as in the Caſe of an Impropriation: *Hales* being Councel, It was inſiſted, the Impropriation was preſentative till *Ed.* 4*th* time, and could not be appropriated withouth the King's Licence, *quod Curia conceſſit*, and he could not produce the Licence; yet, becauſe it was enjoyed ever ſince *Edward* the 4*th* time as Appropriate, the Court did intend a Licence, and that the Patent was loſt before the Inrolment, and a Verdict accordingly, *p.* 27. *Car.* 2. *Coterel*'s Caſe.

Where conſtant enjoyment good Evidence.

In Ejectment for a ſeveral Fiſhing. On Not guilty, if the Plaintiff derive a Title as high as the Abbies, he need not ſhew any Patent, or Derivation from the Crown; but the conſtant enjoyment is ſufficient, unleſs one be ſued by the Crown, 14 *Car.* 2. *B. R.* Sir *Chr. Guiſe* and *Adams*.

In Evidence to a Jury at Bar, The Defendant made Title by the Feoffment of the Lord *M.* to his Son in Law, the Earl of *C.* on which there was no Livery nor Inrolment, but both lived together; but the Father was reputed Owner, and paid the Rates,

Rates, and a year after releaſed and confirmed to his Son and his Heirs; and this Title was oppoſed, becauſe there was never any inception of an Eſtate at Will, no entry being proved by the Son after the Deeds made. But *per Cur.* The Feoffment with future Conveyances is ſufficient, both living together, the entry ſhall be intended, and need not be ſpecially proved; whereupon the Plaintiff was Non-ſuited, *M.* 20. *Car.* 2. *B.R. Dunaſton* and Sir *Jerom Whichcoat.*

What entry ſhall be intended and need not be proved

In *Berry* and *Wheeler*'s Caſe in Ejectment, The Council excepted to an Extent, under which the Plaintiff claimed, becauſe after Execution of *Fieri facias* for part, *Elegit* was for the whole, without mentioning any thing levied by the former *Elegit* which recited the *Fieri facias*, but was returned *nihil, ſed non allocatur.* 2. It was further objected, That it appears, that more than a Moiety is extended: For its ſaid, That the Defendant was ſeized of a Rectory, of the value of 100 *l.* and other Lands appurtenant, *que quidem Rectoria ſine terris Glebalibus* is the Moiety. But *per Cur.* it may be underſtood of the Church-yard, *&c.* diſtinct from other Lands pertaining, and as long as the Extent continues, it cannot thus be denied but there is Glebe, *M.* 14. *Car.* 2. *B.R. Berry* and *Wheeler.*

Extent of a Rectory on *Elegit.*

In Ejectment, The Defendant ſhall not give in Evidence, a former Mortgage or Conveyance made by himſelf, and therefore in ſuch Caſes, its left for him that hath the former Mortgage, to get himſelf made Defendant before the Cauſe comes to Tryal.

Defendant not to give in Evidence, a former Mortgage made by himſelf.

If

Long Poſſeſſion.

If an ancient Deed of Feoffment be ſhewed, but not Livery upon it, if Poſſeſſion have gone along with the Deed; this is good Evidence to a Jury to find Livery, 2 *Rolls Rep.* 132.

Whether parcel of a Priory Certificate.

He which affirms the matter in Iſſue, ought firſt to make proof to the Jury; and when the Priories were ſuppreſſed, a Commiſſion iſſued, and a Certificate upon this, upon all the Poſſeſſions, and their values which belonged to the Priories; and therefore it is good Evidence in Iſſue, whether Land was parcel of the Priory or not, that no mention of it is in the Certificate, *Lit. Rep.* 36.

Variance of the Evidence from the Declaration, or what Evidence ſhall be ſaid to maintain the Iſſue.

Leaſe by two, and one was Leſſor for life remainder to the other.

In *Ejectione Firme*, if the Plaintiff Declares upon a Leaſe made by two, and gives in Evidence, that one of the Leſſors was Leſſee for Life, the Remainder to the other; this is a material variance from the Declaration, in as much as this is only the Leaſe of the Tenant for Life, 2 *Rolls Abr.* 719. *England* and *Long.*

Leaſe by two, where one had nothing in the Land.

So if a Man Declare a Leaſe by two, where one had nothing in the Land, and ſo void as to him; yet this is a material variance *id. ibid.* So if a Man Declare of a Leaſe made by Baron and Feme, and gives in Evidence a Leaſe made by the Husband only, this is a material variance.

So

So it is, if a Man Declare of a Joynt Leaſe made by two, and it appeareth upon the Evidence, That the two Leſſors were Tenants in Common, and ſo ſeveral Leaſes, this is a material variance. But otherwiſe it is, if it appear upon the Evidence, That the two Leſſors were Copartners, for this is one Leaſe being made by them, *Cr. Jac.* 166. *Mantler*'s Caſe.

By Joynt Leaſe, and they are Tenant in Common.

Copartners.

If the Declaration be of a Leaſe of three Acres, a Leaſe of a Moiety in Evidence, will not maintain the Declaration, for it is not the ſame Leaſe, but in *Seabright*'s Caſe, *B.R.* 40 *El.* and *Cooper* and *Franckling*'s Caſe, 14 *Jac. Ejectione Firme* of 20 Acres, the Jury found him guilty of the Moiety, and Not guilty of the reſidue, the Plaintiff ſhall have Judgment againſt *Plowden* 224. *Brake* and *Right*'s Caſe.

The Acres and Leaſe of a Moiety.

The Declaration in *Ejectment* was of a fourth part, of a fifth part, in five parts to be divided; and the Title of the Plaintiff upon the Evidence was but of a third part, of a fourth part, of a fifth part in five parts to be divided, which is but a third part of that which is demanded in the Declaration: And it was ſaid, The Plaintiff cannot have a Verdict, becauſe the Verdict in ſuch a Caſe, ought to agree with the Declaration; but *per Cur.* the Verdict may be taken according to the Title, and ſo it was. *Qu.* how the *habere fac'*, Poſſeſſion in ſuch caſe ſhall be executed, *Sid. p.* 229. *Ablett* and *Skinner*.

Verdict to be taken according to the Title.

The

Variance as to time.

The Plaintiff Declares of a Leaſe made the 14 of *January*, 30 *El. Hab.* from the Feaſt of *Chriſtmaſs* then laſt paſt for three years, and upon the Evidence the Plaintiff ſhewed a Leaſe bearing date the 13 of *January eodem ann.* And it was found by Witneſſes, that the Leaſe was Sealed and Delivered upon the Land the 13th day. *Per Cur.* Notwithſtanding this variance, the Evidence is good enough to maintain this Declaration, for if a Leaſe was Sealed and Delivered the 13 day, it was then a Leaſe of the 14 4 *Leon. p.* 14. *Force* and *Foſter.*

Evidence of fewer Acres then delcared.

The Plaintiff declared in Ejectment of 100 Acres of Land, and ſhewed his Leaſe in Evidence of 40 Acres. And it was urged, That he failed of his Leaſe, for there was no ſuch Leaſe, as that whereof he did Count. But *per Cur.* it is good, for ſo much as was contained in his Leaſe, and for the Reſidue the Jury may find the Defendant Not guilty, *Cr. Eliz. p.* 13. *Guy* and *Rand*, and yet it is held, 2 *Rolls Abr.* 72. *Brown* and *Ells.*

Ejectment of Meadow and Paſture, and the Evidence is *de Herbagio* and *Pannagio.*

If the Plaintiff Declare in Ejectment upon a Leaſe for years of three Acres, and in Evidence he ſhews but a Leaſe of a Moiety, this is a material variance, for it is not the ſame Leaſe. *Ejectione Firme* of ſo many Acres of Meadow, and ſo many Acres of Paſture. Upon Not guilty, the Jury find a Demiſe *de Herbagio* and *Pannagio* of ſo many Acres; the Queſtion was in *Wheeler* and *Toulſon*'s Caſe, *Hard.* 330. If this Evidence ſhall maintain the Iſſue, The Court inclined it did not. Ejectment doth lie of a Leaſe of Herbage, and then by the ſame Reaſon,

Reaſon, the Plaintiff ought to Declare accordingly, and Herbage doth not include all the profit of the Soil, but part of it.

The Declaration was of a Joynt Leaſe made by two, and on Evidence it appears they were Tenants in Common: By three Juſtices againſt one it is good, *Cr. Jac.* 166. *Mantle*'s Caſe, 83. Joynt Leaſe, by Tenants in Common.

Ejectment was of *Lands* in *Oxenhope*, and the Witneſſes upon examination did ſwear there were two *Oxenhopes*, upper, and nither, without Addition; and upon this the Plaintiff Nonſuited at *York* Aſſizes.

If a Man Declare of a Leaſe made by Baron and Feme, and gives in Evidence a Leaſe made by the Baron only; this is a material variance.

Note, The day of the Filing of the Declaration in the Ejectment, may be given in Evidence, where the Demiſe is laid the ſame Term, *Vid. Siderf. p.* 432. *Perdyer*'s Caſe.

Of Demurrer to the Evidence.

It was held by all the Court upon Evidence to a Jury, That if the Plaintiff in *Ejectione Firme*, or other Action, gives in Evidence any matter in Writing or Record, or a Sentence in the Spiritual Court, (as it was in this Caſe) and the Defendant offers to Demur there upon, The Plaintiff ought to joyn in Demurrer or wave the Evidence, becauſe the Defendant ſhall not be compelled to put a matter of difficulty to the Laygents, Demurrer on Evidence.

gents, and becauſe there cannot be any variance of a matter in Writing; but if either Party offer to Demur upon any Evidence given by Witneſs, the other unleſs he pleaſeth ſhall not be compelled to joyn, becauſe the Credit of the Teſtimony is to be examined by a Jury, and the Evidence is uncertain, and may be enforced more or leſs; but both Parties may agree to joyn in Demurrer upon ſuch Evidence, and if the Plaintiff produce Teſtimonies to prove any matter in fact, upon which a Queſtion ariſeth, if the Defendant admit their Teſtimones to be true he may Demur; but in the Caſe of the King, the other Party may not Demur upon Evidence ſhewn in Writing, or Record for the King, unleſs the King's Council will thereunto aſſent: But the Court in ſuch Caſe, ſhall charge the Jury to find ſuch ſpecial matter; but this is by Prerogative, who may waive the Demurrer, or take Iſſue at his Pleaſure, *Cro. Eliz.* 751. *Midlet* and *Baker*, 5 *Rept.* 104. *Baker's* Caſe.

In the King's Caſe.

And in 1 *Inſt. p.* 72. If the Plaintiff in Evidence ſhew any matter of Record or Deeds, or Writings, or any Sentence in the Eccleſiaſtical Court, or other matter of Evidence by Teſtimonies of Witneſſes, or otherwiſe, whereupon doubt in Law ariſeth, and the Defendant offer to Demur in Law thereupon, the Plaintiff cannot refuſe to joyn in Demurrer, no more than in Demurrer on a Count, Replicat. *&c.* and ſo *è Converſo*, may the Plaintiff Demur in Law on the Evidence of the Defendant; but the King's

King's Council ſhall not be inforced to joyn in Demurrer. A Demurrer to Evidence never denies the truth of the fact, but confeſeth the fact, and denies the Law to be with the Party that ſhews the fact, *Plowd. Newis* and *Scholaſtica's* Caſe.

If a Demurrer be upon the Evidence, the Evidence ought to entred *verbatim*, *Keb.* 77.

Exemplification of a Verdict.

A Verdict againſt one whom either the Plaintiff, or Defendant claims, may be given in Evidence againſt the Party ſo claiming; *Contra*, if neither claim under it, *Mich.* 1656. *B. R. Duke* and *Ventres.*

If a Verdict paſs for two Defendants, altho' by default of ones not putting in Bail, They may not have Judgment, yet they may exemplifie their Verdict, to give this in Evidence to another Jury, 2 *Rolls Rep.* 46. *Dennis* and *Bremblecot.*

In Ejectment brought by a Reverſioner, or Debt upon the Statute of Tithes, *Edw.* 6. brought by a Proprietor of Tithes, after a Verdict at Law; the Leſſee or the preſent Proprietor, the Reverſioner of the Lands or Tithes, ſhall hive advantage of the Verdict, and gave it in Evidence: And the Reaſons are, becauſe they cannot be immediate Parties to the Action or Suit, for that muſt be proſecuted by the Leſſee or preſent Tenant, and they may give in Evidence, as well as the Plaintiff himſelf, *Hard.* 2. *Rep.* 473.

CHAP.

CHAP. XII.

Rules for Learning of Special Verdicts. Of Eſtoppels found by the Jury, and how they ſhall bind. What is a material variance between the Declaration and Verdict. Of priority of Poſſeſſion. Where the Special Concluſion of the Verdict ſhall aid the Imperfections of it. Where, and in what Caſes the Verdicts makes the Declaration good. Verdict Special taken according to intent. Difference where the Verdict concludes ſpecially on one Point, and where it concludes in general, or between the Special Concluſion of the Jury and their Reference to the Court. Circumſtances in a Special Verdict, need not be preciſely found. Where the Judges are not bound by the Concluſion of the Jury. Of certainty and uncertainty, in a Special Verdict. Of the finding quo ad reſiduum, *certainty or uncertainty in reference to Acres, Pariſhes, Vills, Place. Of Verdict being taken by Parcels. How the Ejectment of a Manor to be brought. Of a Verdict, on other Leaſe or Date than is declared upon, which ſhall be good or not. Of the Juries finding parcel. Where Verdict ſhall be good for part, and void for the reſidue. The time of the Entry of the Plaintiff's Leſſor where material. Where the Jury ought to find an actual* Ouſter, *on him that had the Right.* Prout lex poſtulat, *how to be underſtood. Where, and in what Caſes Special Verdict may be amended.*

A General Verdict.

IF at a Tryal at Bar there be matter in Law, and the Judges agree to it, and ſo the Jury do not find it Specially, but give a General Verdict, The Judgment ſhall be according to the Verdict, and cannot be ſtaied, 1 *Bulſtr.* 118. *Platt* and *Sleep.*

Ejectment of ſeven Meſſuages *ſive Tenementis*, is ill after a General Verdict; and its ill on Demurrer; but this might have been helped by taking Verdict of either. So it is where Ejectment is *de Meſſuagio & Tenemento*, its ill after a General Verdict, 2 *Keb.* 80. 82. *Burbury* and *Yeoman*; in this Caſe the Verdict was general for the Plaintiff, for the Meſſuages, and *non culp.* for the Tenements it ſeems it had been good. But *Hales* Chief Baron, refuſed to allow of ſuch finding in the Home Circuit: And it was ſaid by the Court as this Caſe is, The Plaintiff may not Aid himſelf *per* releaſing of part, as perhaps he might, had there been Lands alſo in the Declaration, 295 *Meſme Caſe.*

But firſt, I ſhall ſet down two or three things obſervable, as Rules or Directions of the Court, in reference to Special Verdicts.

Council to ſubſcribe the Points in Queſtion.

Special Verdict.

It was made a Rule of Court, That in finding of Special Verdicts where the Points are ſingle, and not complicated, and no Special Concluſions; the Council if required, ſhall ſubſcribe the Points in Queſtion, and agree to amend the omiſſions or mi-

ſtakes in the mean Conveyances according to the truth, to bring the Points in Queſtion to Judgment. It was likewiſe Order'd in *Roll*'s time, That the unneceſſary finding of Deeds, in *hæc verba* upon Special Verdicts, where the Queſtion reſts not upon them, but are only derivative of Title, ſhall be ſpared and found briefly according to the ſubſtance they bear in reference to the Deed, be it Feoffment, Leaſe, Grant, *&c.*

Of finding Deeds in *hæc verba.*

Attachment againſt the Defendant, becauſe he would not bring in his Evidences.

Note, In 2 *Rolls Rep.* 331. An Attachment was awarded againſt the Defendants, becauſe they would not bring in their Evidence, for to have a Special Verdict in *Ejectione Firme*; and this by the courſe of the Court, becauſe there is no other remedy.

As to the Rules of Special Verdict.

Eſtoppels found by the Jury.

Eſtoppels, which bind the Intereſt of the Intereſt of the Land, as the taking of a Mans own Land by Deed indented, and the like being Specially found by the Jury, The Court ought to Judge according to the Special matter; for the Eſtoppels regularly muſt be pleaded, and relied upon by apt Conc'uſion, and the Jury is Sworn *ad veritatem dicendam*; yet when they find *veritatem factis*, they perſue well their Oath, and the Court ought to judge according to Law. So may the Jury find a Warranty, being given in Evidence, tho' it be not pleaded, 10 *Rep.* 97. *vide ſupra tit. Evidence.* And if the Jury find the truth, the Court ſhall adjudge it to be a void Leaſe, *vid. Cr. Eliz.* 140. *Sutton* and *Rawlin*'s Caſe.

In

In *Ejectment*, if it appear by the Record of a Special Verdict, that the Plaintiff had Priority of Poſſeſſion, and no Title be proved for the Defendant, the Plaintiff ſhall have Judgment, as in *Coryton*'s Caſe. *J. Hiblin* was ſeiſed in Fee of the Lands in Queſtion, and by his laſt Will deviſeth unto *A. H.* Leſſor of the Plaintiff, if my Son *T. H.* happen to have no Iſſue-male after the Death of my Wife; and if he have Iſſue-male, then 5 *l.* to be paid to *A. H.* The Deviſor died ſeiſed, leaving Iſſue, *Thomas*, who had *R.* Iſſue-male. *Ann* the Wife of the Deviſor ſurvives him, and after dies; and they find that *A.* and *Eliz.* were Siſters and Coheirs of the ſaid *R.* the Iſſue-male, who died without Iſſue. And they found the Entry of the Leſſor of the Plaintiff, and the Leaſe to the Plaintiff *prout* in the Declaration; and that the Defendant, as Guardian to *A.* and *Eliz.* ouſted him. The Points in Law in this caſe were not argued, becauſe it appears by the Record, That the Leſſor had Priority of Poſſeſſion, and there is not any Title found for the Defendant. For tho it be found that *A.* and *E.* were Coheirs to the Iſſue-male, that is to no purpoſe; becauſe it was not found that they were Heirs of the Deviſor; and the Eſtate-Tail (admitting it were ſo) appears to be ſpent by the Death of *Thomas Hiblin* without Heir-male, and ſo they had no Title; and then the Priority of Poſſeſſion only gives a good Title to the Leſſor of the Plaintiff againſt the Defendant and all the World beſides,

Priority of Poſſeſſion where a good Title.

but only againſt the Heir of the Deviſor, 2 *Sanders* 112. *Allen* and *Rivington*.

In *Bateman* and *Allen*'s Caſe there was Special Verdict in *Ejectment*, *ſed utrum* the Entry of the Defendant upon the matter be lawful or not, they prav Advice. And if the Entry were lawful, they find for the Defendant, if not, *&c.* Now foraſmuch as in all the Verdict it is not found that the Defendant had the primer Poſſeſſion, nor that he entred in the Right, or by the Command of any who had Title; but it is found he entred upon the Poſſeſſion of the Plaintiff without any Title, his Entry is not lawful; and the Plaintiff had good Cauſe of Action againſt him, wherefore the Plaintiff ſhall recover, and ſo held all the Court; wherefore they would not hear any Argument as to matter of Law. But if the Concluſion of the Verdict had been *ſi*, *&c.* whether the Entry of *Hill* and his Wife were lawful or not, then the Judgment ſhould have been upon Matter in Law; for that it ſhould be intended that the Defendant had Title, if the Leſſor of the Plaintiff had no Title; and that the Plaintiff had not Cauſe of Action, but now not, *Craw* and *Ramſey*. *Vide infra. Cro. El.* 437. *Bateman* and *Allen*. *Plus Nervis & Scholaſtica.*

Special Verdict finds *W. B.* ſeiſed, and deviſed the Reverſion of all Meſſuages (except in *D.*) to the Heirs of the Deviſor, and that *Tho. B.* was Brother and Heir, and entred and leaſed to the Plaintiff till the Defendant ejected him, and have found no Title for the Defendant, now being there is

Title found for the Defendant, nor of what Land this Ejectment was (*viz.*) That it was not of that deviſed before the Verdict, is imperfect, and otherwiſe the Plaintiff muſt have had Judgment upon the *prior* Poſſeſſion.

In *Craw* and *Ramſey*'s Caſe, 2 *Ventr.* 3. the Jury find that *Patrick* who was the Iſſue born in *England*, entred, and was ſeiſed; but that he, *Anno Dom.* 1651. did bargain and ſell, *virtute cujus* the Bargainees were ſeiſed *prout Lex poſtulat*, and then bargained and ſold it 1662. *Wild* and *Archer* were of Opinion, That the Plaintiff could not have Judgment upon that Verdict, for that they their Bargainees ſeiſed *prout Lex poſtulat*, but they find the Defendant entred, and ſo the *primer* Poſſeſſion is in him, which is a good Title againſt the Plaintiff, for whom none is found, it being not found that *Patrick* entred. But *Tirrel* and *Vaughan* ſaid, It ſhall be intended that *Patrick* entred; for a Verdict that leaves all the Matter at large to the Judgment of the Court, will be taken ſometimes by Intendment, as well as where the Jury conclude upon a Special Point, *Car. Jac.* 64. The Jury find an Incumbent reſigned, it ſhall be intended the Reſignation was accepted. So *Hob.* 262. And where they find the Bargainees ſeiſed, *prout Lex poſtulat*, that doth not leave it doubtful, whether ſeiſed or not ſeiſed; but whether by Right or by Wrong, for Seiſin muſt be taken as found expreſly, neither do they find any other in Poſſeſſion; yet however if the Defendant had primer Poſſeſſion, he ſhall not have Judgment, if no other Title be found

Intendment.

Prout Lex poſtulat.

If the Defendant hath primer Poſſeſſion firſt, he ſhall not have Judgment if no other Title be found for him

for him, as in *Cr. Car.* 57. *Hern* and *Allen* The Husband makes a Feoffment in Fee with Warranty, and takes back an Eſtate to him and his Wife for their Lives, *&c.* The Husband dies, the Wife enters; the Queſtion was, if the Entry of the Wife ſhall remit to the Eſtate-Tail; but the Jury find the Huſband was ſeiſed *prout Lex poſtulat*, but no Entry by him; and no Remitter can be wrought without an Entry, 2 *Bulſtr.* 31, 32.

Ejectione Firme of the Rectory of *M.* of the Leaſe of *Henry Fowler*, and that the Leſſor was preſented by the Lord *Windſor* upon Deprivation of *A. L.* Upon Evidence it appeared, That the Advowſon was the Inheritance of the Lord *Windſor*, who granted the next Avoidance thereof to Dr. *G.* The Church became void: *Fowler*, Father of *Henry*, by Simony procures *Henry* to be preſented, who was inſtituted and inducted; and ſo the King preſented *A. L.* who was afterwards deprived: But ten days before *Richard Fowler* procures a Grant of the next Avoidance to *J. S.* and procures *J. S.* to preſent *Henry Fowler*. *Per Cur'* his Preſentation is meerly void, he being diſabled ever after to take the ſame place; and every one who is in Poſſeſſion, hath good Title againſt him and his Leſſee, ſo as the Plaintiff cannot maintain this Action, *Cro. Jac.* 533. *Booth* and *Rich. Potter.*

If the Plaintif hath not Title according to his Declaration, he cannot recover, whether the Defendant hath Title or not, and wheiher he be a Diſſeiſſor or not; as where an

an Infant makes a Leaſe at Will, who enters and ouſts the Plaintiff, and the Plaintiff brings *Ejectment*. *Vid.* 1 *Leon.* 211. *Cotton's* Caſe.

Ejectione Firme was brought upon a Leaſe made by *Roan* of the Rectory of, *&c.* Special Verdict found *Glover* put in a *Caveat* to the Biſhop in the Life of the Incumbent; the Incumbent dies, and afterwards by the Preſentation of *Mantle*, *Morgan* was inſtituted. And after *Wingfeild* preſents *Glover*, who was inſtituted and inducted; and after the King preſents his Clerk *Roan*, who was inducted; and after *Morgan* was inducted, and after *Roan* enters, and lets to the Plaintiff, who upon the Entry of the Defendant, brought his Action. Now *Morgan* was inſtituted, and after *Glover* was inducted, which was void; but by that he had the Poſſeſſion, and afterwards *Roan* the Preſentee of the King is inducted; and after *Morgan* is inducted; and after *Roan* enters, and *Glover* enters upon him: The Queſtion was, Who had better Poſſeſſion *Roan* or *Glover*? *Per tot' Cur' Roan* had the better Poſſeſſion, if it be admitted that the King had not any Title to preſent; for tho' *Glover* had the firſt Poſſeſſion, yet his Poſſeſſion was defeated by the Induction of *Morgan*, who had the true Right; and then when *Roan* enters upon him, he had the firſt Poſſeſſion, and better Right againſt any other *præter Morgan*; and by Conſequence the Action will lie by the Leſſee of *Roan* againſt *Glover*, *Moor* 191. *Hicthorn* and *Glover*.

On Special Verdict it was found, that it was Copyhold, parcel of the Manor of *S.* demiſable for three Lives, and that by the Cuſtom of the Manor the firſt Name in the Copy ſhould enjoy it during his Life, *& ſic ſucceſſive*; and that the Lord *A.* granted it by Copy to *Alice W.R.W.* and *J.W.* her Sons for three Lives; that *R. W.* made Waſte in cutting down Timber Trees. Lord *A.* ſeiſed it, and granted it by Copy to the Leſſor of the Plaintiff for his Life, and after licenſed him to let Tenements *infra ſcript' in quibus*, &c. for five years, if *J.* the Leſſor of the Plaintiff ſo long lived; that he let to the Plaintiff for three years, who entred, and the Defendant ouſted him. *Et ſi ſuper totam*, &c. *per Cur'*, inaſmuch as it is a good Leaſe made to the Plaintiff, and no Title at all appears for the Defendant, but that he entred upon the Plaintiff's Poſſeſſion, and not by Command of any who had Right, altho' there were ſome matter between the Plaintiff and the firſt Copyholder, yet Judgment ought to be *pro Quer'*, *Cro. Jac.* 436. *Worledge* and *Benbury*.

So in *Powel* and *Goodard*'s Caſe, *Tr.* 21 *Car.* 2. *B. R.* in *Ejectment*, Special Verdict finds *W. G.* ſeiſed in Fee, and deviſed that *P.* and *J. G.* ſhould be Truſtees, and take the Profits till the full Age of *H. G.* whom he makes his Heir. *W. G.* doth authoriſe his Feoffees to ſell ſo much of his Lands for payment of Debts and Funeral Charges as in their diſcretions ſhall ſeem meet. The Feoffees for 80 *l.* Leaſe for 99 years to begin after the Death of *R. G.* and his Wife, to three,

three, one whereof is Leſſor of the Plaintiff; it was found at the time of the Sale, that all the Debts were paid. *Per Cur'*, the Fee being given away from the Heir of the Deviſor, Priority of Title is a ſufficient poſſeſſion, unleſs ſome Title be found for the Defendant; and primer Poſſeſſion is good where neither Party hath Title; and in this Caſe the Leaſe was adjudged void, the Truſtees not being enabled to ſell farther than to ſatisfie Debts.

Priority a ſufficient Title.

In *Wallis's* Caſe, *Stiles Rep.* 291. Special Verdict was on a Copyhold-cuſtom, the primer Poſſeſſion will make a Diſſeiſin, if the Cuſtom be not well found; it was not found in that Caſe that the Land was demiſable according to the Will of the Lord, and ſo it may be Free-Land, and the Cuſtom did not extend to it; nor is it found that the Parties to whom the Lettor of Attorney—— was made to ſurrender, were cuſtomary Tenants, and then the primer Poſſeſſion by the Defendant will make a Diſſeiſin, and Judgment *pro Quer'*.

Where primer Poſſeſſion makes a Diſſeiſin.

In *Ejectment* prior Poſſeſſion is a good Title againſt the King's Preſentation, but not ſo in a *Quare Impedit*; for there the Incumbent ought (altho' Defendant) to make a Title againſt the King's Preſentation without Title, as is the Book 7 *H.* 4. 31. but if the Incumbent be in by Entry of his own Head, without Preſentation, it is not ſufficient in either, 1 *Keb.* 503. *Brown* and *Spencer*.

In Ejectment prior Poſſeſſion a good Title againſt the King's Preſentation, not ſo in a *Quare Impedit*.

The

Si conſtare poterit that it is the ſame Land, it is good.

3. The Special Verdict is good, *ſi conſtare poterit*, that it is the ſame place and the ſame Land in the Declaration mentioned, although it be not found expreſly; and although the Jury find not that it is the ſame Land in the Declaration mentioned, yet if they find the Entry and Ejectment according to the Declaration, it is ſufficient; and therefore the Miſtake of a Letter, or Addition of a Word ſhall not hurt the Verdict, *ſi conſtare poterit*, &c. *Siderf. p.* 27. *Hoare* and *Dix.*

The Special Concluſion of a Special Verdict, ſhall aid the Imperfections of it.

4. In many Caſes the ſpecial Concluſion of a Special Verdict ſhall aid the Imperfections of it. If the Jury find a Special Verdict, and refer the Law upon that ſpecial Matter to the Court, although they do not find any Title for the Defendant, which is a collateral thing to the Point which they refer to the Court, yet the Verdict is good enough; for all other things ſhall be intended, except this which is referred to the Court. As in Ejectment, if the Plaintiff declare upon a Leaſe made by *A.* and the Jury find a Special Verdict and matter in Law upon a Power of Revocation of Uſes by an Indenture and Limitation of new Uſes, and then a Leaſe for years made to the Plaintiff by the Leſſor in the Declaration, and another in which there is a perfect Variance; but they conclude the Verdict, and refer to the Court, whether a Grant of a new Eſtate found in the Verdict, be a Revocation of the firſt Indenture, or not. The ſpecial Concluſion ſhall aid the Verdict, ſo that the Court cannot take notice of the variance between

between the Leaſe in the Declaration and the Verdict, becauſe the doubt touching, the Revocation is only referred to the Court. And although they refer to the Court, whether this be a Revocation of the firſt Indenture, and not of the former Uſes or Limitation of new Uſes, as it ought to be, yet in a Verdict this is good; for their intention appears. But where the Jury find ſpecially, and furthermore conclude againſt Law, the Verdict is good, and the Concluſion is ill; and the Court will give Judgment upon the ſpecial Matter without having regard to the Concluſion of the Jury, 5 *Rep.* 97. *Litt. Rep.* 135. 2 *Keb.* 362, 412. 11 *Rep.* 10. *Moor* 105, 269. So note this Diverſity between a ſpecial Concluſion of the Jury, and Reference to the Court, and a general Concluſion and Reference to the Court. A preciſe Verdict may make the Declaration good, which otherwiſe would be ill, as the Declaration is of Lands in *Sutton Coefeild*; and the Verdict finds the Lands in *Sutton Colefeild*, and the Deed is of Lands in *parva Sutton infra Dominium de Sutton Colefeild*; ſo neither the Verdict nor Deed agree with the Declaration for the Vill where the Lands lie; therefore no Judgment ought to be given. But *per Cur'* the Verdict finding Seiſin *de infra ſcript' meſſuag'*, that is *quaſi* an expreſs Averment; and finding that *Sutton Coefeild* and *Sutton Colefeild & parva Sutton infra Dominium Sutton Colefeild*, are all one, and that they be all in one Pariſh, and this being in a Verdict when the Jury found *Quod dedit tenementa infra ſcript'* by Name in

Intent.

Where the Verdict is good, and the Concluſion ill.

Diverſity between a general Concluſion and a ſpecial Concluſion

A Special Verdict may make the Declaration good.

in the Deed, shall be intended all one. So its aided by the finding of the Jury, who find expresly that the Bishop, *dedit Tenementa infra Script. Cr. Jac.* 175. *Ward* and *Walthow*, *Yelv. p.* 101. *Mesme* Case.

Lease. 5. The Judges are not bound by the conclusion of the Jury, as in Ejectment on a void Lease, the Jury find Lease, that if the Entry of the Daughter was not congeable, the Defendant is Guilty: Now the Judges are not bound by the conclusion of the Jury, but may Judge according to Law, as 10 *Ed.* 4. *f.* 70. Trespas was brought against the Lord for Distraining. The Jury found for the Plaintiff. But because the Statute of *Marlbudge*, is *non ideo puniatur Dominus, &c.* The Court shall adjudge for the Defendant. So is the Rule in *Plowd. Com.* 114. *b.* when the Verdict finds the fact, but concludes upon it contrary to Law, the Court shall reject the conclusion, as in *Amy Townsend's* Case. The Jury find precisely that the Wife was remitted, which was contrary to Law, for their Office is to judge of matters of Fact, and not what the Law is. So, if the Jury collect the contents of a Deed, and also find the Deed in *hæc verba*, The Court is not to Judge upon their Collection, but upon the Deed it self; *Moor p.* 105. *Lane* and *Cooper*.

And yet the Court is sometimes bound by the conclusion of the Jury; as in *Ejectione Firme* of one Acre, The Jury find the Defendant Guilty of one Moiety, and a Special Verdict for the residue, and conclude if the Court shall find him Guilty of all, then &c. The Plaintiff cannot have Judgment upon

on this for a Moiety, if the Court ſhall not adjudge him Guilty of the whole for the Special concluſion cited, 1 *Rolls Rep.* 429.

1. Special Verdict ſhall be taken according to Intent, and the Court muſt make no more doubts than the Jury does; the finding matter of Fact being only the Jurors Office, as 5 *Rep. Goodales's* Caſe, The doubt was, whether the payment of 100 l. with agreement to have ſome part of it back again, were ſufficient upon a Condition to defeat the Eſtate of a Stranger: The Court regarded not, that there was no Title found for the Party that made the Entry, whereupon the Action was brought. *Ejectione Firme* was brought by *G.* againſt *W.* upon Not guilty, the Jury concluded their doubt upon performance of a Condition, by Payment of Money by Sir *J. P.* to one *W.* but yet, in making up their Verdict, they had given the Poſſeſſion to the Plaintiff by Leaſe, and laid the Entry upon him by *W.* without any Title under Sir *J. P.* but that was included and ſo not regarded, *Hen.* 55. 262.

Verdict to be taken according to Intent.

When the Verdict concludes ſpecially on one point, the Court ſhall doubt of no more than the Jury doubts, ſecurs where it concludes it the General.

But if the Jury conclude upon the General, whether the Defendants Entry were lawful or not, which is all one, as if they had referr'd to the Court whether he be Guilty or not; this depends upon all the Points of the Verdict indifferently, that may prove him Guilty or Not guilty, *Hob.* 262. So is *Caſtle* and *Hobb's* Caſe, *Cro. Jac.* 22. The Verdict was on the paſſing by Letters Patents, and the Jury found, that if they were good Letters Patents, then for the

General concluſion depends upon all the Points of the Verdict.

the Defendant, otherwiſe they found for the Plaintiff, and they find no Title for the Plaintiff: But it is intended, there is a ſufficient Title found for the Plaintiff, unleſs by this Patent it be defeated and avoided; ſo that if the Jury be ſatisfied, that the Plaintiff hath any good Right by any other manner of Title, the Court ought not to doubt thereof.

How, and in what Caſes Special Verdicts ſhall be taken by Intent or Preſumption, and what things ſhall be ſupplied.

I Deviſe all thoſe my Lands in *Shelford* called *Somerby*, to *W.* in Tail remainder over; and it is not found *per* Verdict, that thoſe Lands in the Action are called *Somerſby*. But *per Cur.* for as much as the contrary is not found, it ſhall be intended, that he had not other Lands in *Shalford*, than thoſe which were called *Somerſby*, tho' that name be not at firſt given them; for it was, I Deviſe all my Lands in *Shalford* to his Wife for Life, and the remainder in Tail *prout ante*, *Co. Eliz.* 828. *Peck* and *Channel*.

It ſhall be intended, that the Reverſion continues in the Party, as if a Special Verdict find that *A.* was poſſeſt for years of Land, and that the Reverſion in Fee was in *B.* and that *A.* Deviſe the Term to *C.* after the Death of *M.* whom he makes his Executor, and dies, and *M.* enter, and during his Life *C.* after releaſeth his poſſibility to *B.* and it is not found, that the Reverſion continued

Reverſion ſhall be intended to continue.

tinued in *B.* at the time of the Releaſe; yet it ſhall be intended to continue in him in a Verdict, it being found to be once in him by the ſame Verdict before, *p.* 13 *Car.* 1. *B. R. Johnſon* and *Trumper.*

A Life ſhall be intended to be in being tho' not found, as was *Fretzvil* and *Mollineux*'s Caſe. If the Jury find the Title of the Plaintiff to be under one, who was Leſſee for Life, and they find the Eſtate for Life, but do not find the Tenant for Life is alive; The Life ſhall be intended and ſupplied, the concluſion and reference to the Court being upon other matter. Special Verdict in Ejectmet found, that *J. J.* was deprived by the high Commiſſioners of a Benefice, and it is found in this manner, That ſuch perſons *authorizati virtute Literar' Patent' Eliz. Reg.* and it is not found, that the Letters Patents were under the great Seal; yet this is good, and ſhall be intended in a Verdict, *Tr.* 13 *Car.* 1. *B. R. Allen* and *Naſh.*

Where a Life ſhall be intended to be in being.

Jury find *virtute Literar'* do not find they were under Seal.

In Ejectment, The Verdict was on a *Proviſo* of Revocation of uſes, That it ſhould be lawful for the Covenantor, being in perfect health and memory, under his Hand and Seal, and by him delivered in the preſence of three credible Witneſſes, *&c.* It was agreed, That tho' the Verdict do not find the Covenantor was in perfect health and memory; yet that was well enough, for it ſhall be preſumed, except the contrary were ſhewed, and ſo for the preſence of credible and ſufficient Perſons. Otherwiſe, if it were in the preſence of ſufficient ſubſidy Men, *Hob.* 312, *Kibbet* and *Lee.*

What ſhall be preſumed unleſs the contrary be ſhewed.

If

If the Jury find that *J. S.* was ſeiſed in Fee, and deviſed the Land to *J. D.* altho' they do not find the Land was held in Soccage, yet that is good; for this ſhall be intended, it being a Collateral thing, and it being the moſt common Tenure.

Deviſe. If the Jury find that *J. S.* was ſeiſed in Fee, and made his Will in *hæc verba*, and that he afterwards died; altho' they do not find he died ſeiſed, yet it ſhall be intended, he died ſeiſed, and ſo good. But

If the Jury find the Words of the Will, and yet do not find the will, the Verdict is not good

Bargain and Sale. And if the Jury find a Bargain and Sale, and a Fine, and do not mention Inrolment or Proclamations, it ſhall not be intended, *Hob.* 262.

In *Ejectione Firme*, the Verdict finds that *E. D.* the Leſſor, and Conilor was ſeiſed in Tail of the Manor of *B.* at the time of the Recognizance, and that this Manor was delivered in Extent; but he doth not ſay that the Lands in the Declaration were parcel of the ſaid Manor, and ſo its not found, that this Land was delivered in Extent, and then the Defendant had no Title.

Extent. *Per Cur.* its not material, it ſhall be intended in a Special Verdict; otherwiſe there is no Cauſe of a Special Verdict, *Cr. Car.* 458. *Cleve* and *Vere*.

It was objected in *Corbet* and *Stones*'s Caſe, *p.* 1653. *B.C.* The Jury find that after a Fine levied, and before the Ejectment, the intereſt of *M. C. F. B.* and *K. B.* of the Lands in Queſtion, came to the Leſſor of the Plain-

Plaintiff, but ſhews not how. But *per Cur.* it is good enough, for when the Jury finds the intereſt comes to the Leſſor, the Court intends all Circumſtances, that ſhall conduce to that fact; for the Court doubts not when the Jury doubts not, 4 *Rep.* 65. *Fullwood's* Caſe. That the Intereſt of the Lands came to the Leſſor, but ſhews not how.

The Jury find that *J. C.* came before the Recorder of *London*, and Mayor of the Staple, and acknowledged himſelf to *T. R.* in 200 *l.* Exception was taken, that there was no finding of any Statute there; for it was found, that this was *ſecundum formam Statuti*, and that it was by Writing. But *per Cur.* its good enough, for all Circumſtances ſhall be intended *Raym.* 150. Statute.

And there is another Rule in our Books perſuant to this laſt, in a Special Verdict the Circumſtances ſhall be intended, or in a Special Verdict, the Circumſtances of every thing need not to be ſo ſtrictly found as in pleading. As in Ejectment, the Jury found he delivered the Leaſe upon the Land, but found not, that he had entred and claimed, *Cr. Eliz.* 167. *Willis* and *Fermin.* And in *Goodall's* Caſe, 5 *Rep.* it was reſolved, That all matters in a Special Verdict ſhall be intended and ſupplied, but only that which the Jury refer to the Conſideration of the Court. In a Special Verdict all neceſſary circumſtances ſhall be intended.

Alſo in *Molineux's* Caſe, *Cr. Jac.* 146. It was excepted to a Special Verdict, That the Life of *B.* who was Tenant for Life, and the Leſſor in the Action was not found: But *per Cur.* it ſhall not be intended that ſhe is dead, unleſs it been found. And in a Spe- A Life

cial Verdict, all neceſſary Circumſtances ſhall be intended, unleſs found to the contrary: But ſome things the Court ſhall not intend, as in *Sadler* and *Draper*'s Caſe, Sir *Thomas Jones*, *p.* 17. where the Caſe was whether the next of the Blood being of the half Blood (*i. e.* whether the Brother of the half Blood of the Mother of an Infant, ſhall be Gardian in Socage of Land, by diſcent on the part of the Father,) *Cro. Eliz.* 825. But becauſe the Verdict did not find that the Leſſor of the Plaintiff, who claims to be Gardian in Socage, was *proximus in ſangine à quel, &c.* that the Court ſhall not intend it, and ſo no Title found *pro Quer. Ideo nil. cap. per Bill.*

Some things ſhall not be intended.

If the Jury find a Special Verdict (*viz.*) *A.* deviſeth his Lands to his Executors *quouſque* they ſhall Levy ſuch Money, or his Heirs ſhall pay to them the ſaid Sum, and conclude upon the matter *ſi, &c.* but they do not find the Heir had not paid the Money. This *quouſque* the Heir pay the Money, is parcel of the Limitation of the Eſtate which ought to have been found: Otherwiſe, the Court who is to Judge upon the whole matter, ſhall not intend it, *Tr.* 19. *Jac. B. R. Langley* and *Pain.* But if in a Special Verdict, the Jury find *J. S.* was ſeiſed in Fee of Land, and made his Will, and by it deviſeth all his Eſtate to *B.* paying Debts and Legacies, and refer to the Court the matter in Law, (*viz.*) whether a Fee paſſeth by this, but find not that *B.* had paid the Debts and Legacies; yet this is a good Verdict, becauſe it is a Condition, pro-

Difference between the Condition and Limitation of an Eſtate, as to the finding by the Jury.

properly and not a Limitation, *Tr.* 1651. *Johnſon* and *Kerman*; yet if the Verdict find that *J. S.* was ſeiſed in Fee of Land, and poſſeſt of certain Leaſes for years of other Lands, and by his Will deviſeth his Leaſes to *J. D.* and after deviſeth to his Executors all the Reſidue of his Eſtate, Morrgages, &c. his Debts being paid, and his Funeral expences diſcharged; this was not a perfect Verdict, the matter in Law referred to the Court being, whether the Executors had an Eſtate in Fee by this Deviſe in as much as it is not found, that the Debts were paid, &c. which is a Condition precedent ſo as the Executors cannot have it till the Debts paid, and *venire de novo* granted, *Hill.* 10 *Car.* 1. *B. R. Wilkinſon*'s Caſe, *Vide* 2 *Leon.* 152. *Allen* and *Hill*'s Caſe, Condition muſt be punctually found.

Finding the ſubſtance of the Iſſue is ſufficient.

To this purpoſe it is laid down often in our Books as a Rule. That if the Jury find the ſubſtance of the Iſſue it is ſufficient, as in Ejectment of a Manor: If the Jury find there were no Freeholders, and ſo it is no Manor in Law; yet it being a Manor in Reputation, and ſo the Tenants paſs by the Leaſes, therefore this Verdict is found for him who Pleads the Leaſe of the Manor, for the ſubſtance is whether Bargain and Sale, *de modo irrotulat'* and not ſaid in ſix Months, its good in a Verdict but not in a Plea, 3 *Keb.* 180. *vide ſupra Corbet* and *Stones*'s Caſe.

If in Ejectment a Leaſe is pleaded of a Manor, &c. and the Iſſue is *quod non dimiſit manerium*, and the Jury give a Special Ver-

dict, That there were not any Freeholders but diverſe Copyholders of the Manor, and that it was known by the name of a Manor, tho' it was not any Manor in Law for default of Freeholders; and tho' this was alledged in pleading to be a Manor, which pleading is made by learned Men, and tho' this was in an Action adverſary and not amicable; yet, for as much as the Iſſue is triable by the Lay-gents, and in truth the Tenements in which, *&c.* paſs by the Leaſe; the Verdict is found for him that Pleads the Leaſe of the Manor, for the ſubſtance of the Iſſue is, whether it were demiſed or not, *Vines* and *Durham*'s Caſe cited, 6 *Rep.* 77. in Sir *Moyle Fincheb*'s Caſe.

Manor in reputation, and not in ſtrict Law.

What one cannot plead ſhall be found by Verdict.

8. It is a Rule in Law, in ſuch Actions in which one cannot Plead, there the matter to be pleaded ſhall be found by Verdict, and this well; but where the Party may Plead there the ſame is to be pleaded by him, 1 *Bulſtr.* 166.

The Jury may find a Warranty being give in Evidence, for in Ejectment from Treſpaſs, and in Act on the Satute of 5 *R.* 2. *cap.* 7. A Warranty is not to be pleaded (or other perſonal Action:) The nature of a Warranty, and to have benefit thereby, is to be by way of *Voucher* and *Rebutter* in a real Action; and muſt Plead or loſe the benefit of it, but in perſonal Actions Collateral Warranty cannot be pleaded by way of Bar; yet it may be given in Evidence to a Jury, and the ſame is to be found by Verdict of the Jury; *Vid. ibid. Heywood* and *Smith.*

9. If

9. If any thing be omitted in the Declaration, or if more is put in the Declaration than is found by the Jury, if it makes a material variance between the Declaration and the Verdict, the Action ſhall abate as if a Declaration in Ejectment be of a Leaſe of three Acres; a Leaſe of a Moiety will not Warrant the Declaration: But if the variance be by way of Surplus or Defect, if it be not material in the extenuation of the Action, or Damages, Action will lye.

10. The Jury may give a Verdict by preſumption, as to find Livery in reſpect of long Poſſeſſion; but if they find the matter Specially, the Court will not adjudge this a Livery, 1 *Rolls Rep.* 132. Verdict by preſumption.

11. A Verdict that finds part of the Iſſue, and nothing for the reſidue is ſufficient, *Vide poſtea.*

12. Fraud ought not to be preſumed, unleſs it be expreſly found, 2 *Rep.* 25. 10 *Rep.* 56. *Cr. Car.* 549. *Criſp* and *Pratt.*

Where and in what Caſes Entry muſt be expreſly found or not, and of the force of the words prout lex *poſtulat.*

In *Horewood* and *Holman's* Caſe, 2 *Bulſt.* 29. Lands are given to the uſe of a Man and his Wife, the Remainder to the Heirs of the Body of the Husband; the Husband makes a Feoffment in Fee with Warranty, and takes back an Eſtate to him and his Wife for their Lives, the Remainder over to make a Remitter to the Wife, there ought to be

To make a Remitter, there must be a new Entry. *Prout lex postulat.*

an Entry, and no new Entry is found by the Special Verdict to be by the Husband, but only *prout lex postulat.* The Court adviſed a new Tryal, and to amend the Special Verdict, and to find the Entry of the Baron and Feme.

The time of the Entry of the Plaintiff's Leſſor.

The time of the Entry of the Plaintiff is ſometimes material, as in *Fort* and *Berkley's* Caſe. *Per Cur.* In that Caſe which way ſoever the Law had been taken, Judgment could not have been given for the Defendant. There was a Leaſe made to *Godolphin* in Reverſion, under whom the Plaintiff claims. *Cherſey* the Leſſor of the Plaintiff did Enter upon the Poſſeſſion of *Berkley* the Defendant, but when he did Enter does not appear; then the Caſe is, *Berkley* was in Poſſeſſion. If the Leſſor of the Plaintiff enter'd before the Term began, he was a Diſſeiſor as it was, *Dier* 89. *Clifford's* Caſe. But its ſaid he was poſſeſt *prout lex poſtulat*, as ſo he was of the Reverſion too, it does not appear but that he was a Diſſeiſor and ſo continued, *Carters Rep.* 159, 160.

Prout lex poſtulat.

Where actual *Ouſter* muſt be found.

If the Title appear to be in a Stranger, they muſt find an *Ouſter* made to him who had the Right. And therefore in *Ejectione Firme*, If the Jury find a Special Verdict, being matter in Law upon a Leaſe for years, reſerving Rent upon Condition, &c. but no Title is found for the Plaintiff nor Defendant; but it is only found, that the Leſſor of the Plaintiff being a Stranger Enters into the Land and Leaſeth this to the Plaintiff, by which the Plaintiff was poſſeſt *prout lex poſtulat*, until the Defendant entred and ejected

ejected him; this is not a good Verdict, the Title appearing to be a in Stranger, without any actual *Ouster* made to him who had the Right, 2 *Rolls Abr.* 699. *Bland* and *Inman*.

In an *Ejectione Firme*, the Jury find a Special Verdict, and find Special Matter in Law, whether *J. S.* had right to the Land, upon which the Court adjudged, That he has right to the Land. But they find farther, That *J. D* Entered into the Land upon *J. S.* and was thereof seized *pront lex postulat*, and made the Lease to the Plaintiff, and the Lessee was by force of this possessed, and it is not found that *J. D.* disseised *J. S.* and for that, upon this Verdict shall not be intended that *J. D.* ousted *J. S.* and disseised him, and then the Entry of *J. D.* and his Lease is void, and so an Action does not lie against a Stranger, who had nothing in the Land, as was *Hitchin* and *Glover*'s Case. Ouster Disseisin.

In *Ejectione Firme*, by the Lessee of a Colledge, if the Jury find a Special Verdict in this manner, (*viz.*) That the Colledge let this to *A.* upon Condition, and found a Special Matter in Law, whether the Condition be broken, and that the Colledge supposing the Condition broken by their Bayliff entred, and let this to the Plaintiff, this is not a good Special Verdict, without finding of a command given by the Colledge to the Bayliff to Enter, to be by Deed, for otherwise it is not good, 2 *Rolls Abr. p.* 700. *Dumper* and *Simms*. Entry by a Colledge how to be found.

A. was ſeiſed and demiſed to his Executors, the Lands in Queſtion for the performance of his Will, till the Executors levy 100 Marks, or until his Heirs pay to them 200 Marks, and that the Executors after his Death entred and were poſſeſt *prout lex poſtulat*, and being ſo poſſeſt granted to the Plaintiff, who entred and was poſſeſt till the Ejectment. This is uncertain, becauſe it is not found that the Heir had paid the Money, for they ſay *ſuper totam materiam*, and to ſay *prout lex poſtulat*, is not an affirmation of any certain Poſſeſſion, *Palmer* 192. *Langly* and *Paine*.

Prout lex poſtulat, how far extend.

Super totam materiam.

Of the Juries finding by Parcels.

Verdict that finds part of Iſſue, and nothing for the reſidue is inſufficient.

It is a Rule: A Verdict that finds part of the Iſſue, and nothing for the reſidue is inſufficient. As in *Pemble* and *Sterne*'s Caſe, *Raym.* 165. The Demiſe is laid of a Park Meſſuage 300 Acres of Land, and the Verdict finds only as to parcel, and nothing of the reſidue for the Plaintiff or the Defendant; the Verdict is void; ſo is the Rule, 1 *Inſt. p.* 227. A Verdict that finds part of the Iſſue, and finding nothing of the reſidue it is inſufficient for the whole, becauſe they have not tried the whole Iſſue wherewith they are charged, *Car. Jac.* 113. *Ejectione Firme* of a Leaſe of Meſſuages, 3000 — Acres of Land, 3000 Acres of Paſture in *D. per nomina* of *Monkhal.* and 5 Cloſes *per nomina*. On Not guilty the Jury gave a Special Verdict, (*viz.*) *quoad* 4 Cloſes of Paſture containing by Eſtimation

mation, 2000 Acres of Paſture, that the Defendant was Not guilty, *quoad reſid.* they find the matter in Law; this Verdict is imperfect in all, for when the Jury find that the Defendant was Not guilty of 4 Cloſes of Paſture containing by Eſtimation, 2000 Acres of Paſture it is not certain, and it doth not appear of how much they acquit him, and then when they find *quoad reſiduum* for the Special matter, it is uncertain what that reſidue is; a *Venire fac' de novo* was awarded, *Woolmer* and *Caſton*'s Caſe. But if the Verdict be of more than declared for, it ſhall be void for the reſidue. As Ejectment for him who pleaded all of 14 Acres, and the Jury find Guilty of 20 Acres, 14 Acres, The Plaintiff ſhall have Judgment for the and the Verdict ſhall be void for the reſidue, 2 *Roll. Abr.* 707. 719. *Seabright*'s Caſe.

Quoad reſid.

A Verdict of more than declared for.

In Ejectment of a Manor, and ſo many Acres as includes the Manor; the Jury find for the Plaintiff as to the Manor, *præter* the Services; and as to the Services Not guilty. And Judgment *pro Quer.* Here are 2 manifeſt Errors. 1. When the Court is of a Manor, the Jury cannot find for the Plaintiff, for that which is not a Manor; and there is none that brings Ejectment of a Manor, but they alſo add the Acres that contain it, to the end, that if they prove it not a Manor they may recover according to the Acres, but they muſt enter it ſo, but not as here generally of both. 2. The Verdict being as much as the Count, the Judgment againſt the Plaintiff cannot be in

Ejectment of a Manor, how to be brought.

Miſe-

Misericordia, if it be ſuppoſed good. The Court held them to be manifeſt Errors and aſſignable by the Defendant, *Hob.* 108. *Latch* 61. *Cr. Jac.* 113. 1 *Keb.* 110. *Hammond* and *Conisby*. But I conceive that is not Law, for in *Hammond* and *Conisby*'s Caſe, *Ejectione Firme* was of a Manor; upon Not guilty, there was a Verdict *pro Quer.* for the Manor, and *quoad* the Services Not guilty. Error was aſſigned, becauſe the Verdict is not for the Plaintiff, for the Manor, becauſe as to the Services it is for the Defendant. But *per Cur.* The laſt part of the Verdict ſhall be taken general for the Plaintiff, *Sid.* 232. *Ejectione Firme* of a Meſſuage. On Not guilty, the Jury find the Defendant guilty of 2 parts of the Houſe: It was alledged in Arreſt of Judgment, That the Verdict has not found the Defendant Guilty according to the Count, which is of a Meſſuage an entire thing. *Manwood contra: Omne majus continet in ſe minus*; but if the Declaration had been of 2 parts of a Meſſuage, and on Not guilty, the Jury had found him Guilty of the entire Houſe, The Plaintiff ſhall not have Judgment, *Savill* 27.

Surpluſe in a Verdict.

In *Ejectione Firme* of a Meſſuage, if it be found that a little part of the Houſe is Built by incroachment upon the Land of the Plaintiff, and not the Reſidue; yet the Plaintiff ſhall recover for this parcel by the name of an Houſe.

The Verdict may be of fewer parts than the Declaration.

It's laid down poſitive in *Ablett* and *Skinner*'s Caſe in *Sid. p.* 229. that the Verdict may be of fewer parts than in the Declaration:

tion: As on Tryal at Bar in *Ejectment* the Declaration was of a fourth part of a fifth part in five parts to be divided, and the Title of the Plaintiff upon the Evidence was but of a third part of a fourth part of a fifth part in five parts to be divided, which is but a third part of what is demanded in the Declaration. It was said the Plaintiff cannot have a Verdict, because the Verdict in such Case ought to agree with the Declaration; but *per Cur'* the Verdict may be taken according to Title; and so it was. But Qu. how the *Habere fac'* shall be executed.

If the Verdict in Ejectment contain more than the Declaration, the Plaintiff may release the Damages. *Q.* if he may release part of the Land, *Sid. p.* 412.

If the Verdict contain more than the Declaration, the Plaintiff may release his Damages.

Ejectione Firme of the Manor of *Dale*; on *Non Culp'* pleaded, the Jury find, *quoad unum Messuagium parcel' Manerij prædict'*, guilty; *quoad reſid'* Not guilty. It is moved he cannot have Judgment; the Action is brought of the Manor, and the Jury find him guilty of one House only, so he cannot have his Judgment according to his demand. So *Delabar* and *Hudleſtone*'s Case. *Ejectment* of a Rectory, and upon *Non culp'* pleaded, the Defendant was found guilty of Tythes without the Glebe; and he could not have Judgment, the Glebe being the Principal. So *Ejectione Firme* of a Manor, and proves only the Rents, he shall not have Judgment. *Ejectment* was of an House, the Special Verdict was, That the Plaintiff was seised in Fee; and if there be several things laid in *Ejectione Firme*

As to a Manor.

If several things are laid in *Ejectione Firmæ*, and the Jury find the Defendant guilty in one, the Plaintiff shall have Judgment of that.

Firmæ, as House, Garden, &c. and the Jury find guilty of one only, the Plaintiff shall have Judgment of this. In *Delabar*'s Case it was not found that the Tythes were parcel of the Rectory, and so it differs from this Case. In *Ejectione Firmæ* of a Manor and ten Acres, it is no Plea that the ten Acres are parcel of the Manor, *aliter* in Entry in the nature of an Assise. *Adjornatur.*

Where the Jury may conclude upon a Moiety or not.

The Jury find the Defendant guilty of one Moiety, and for the other Moiety a Special Verdict, this is no Error; for the Jury may conclude upon the Moiety, for it may be he entred into one Moiety, and not into the other; but if he declares upon the whole, they cannot find him guilty of a Moiety, 3 *Bulstr.* 229. *Milward* and *Watts.* But if one declares in *Ejectione Firmæ* upon a Fence made in certain Lands, and he has Title but for a Moiety, the Jury are not to conclude upon the Moiety, for they are not to judge upon this, but the Court.

Where a dying seised or possest, must be found.

A Man by his last Will and Testament devised all his Fee-simple Lands whatsoever to his Brother, on Condition he suffer his Wife to enjoy all his Free Lands in *H.* during her Life, and the Jury found the Testator had only a Portion of Tythes in *H.* but they did not find the Testator died seised of the Tythes, which without doubt had been ill upon the Demurrer. And *Rolls* said, He would

would see the Notes by which the Special Verdict was drawn up, if that could help it. For they all agree the Verdict ought to have found the Dying seised, *Stiles Rep.* 279. *Saunders* and *Rich.*

In *Ejectione Firme* if the Jury find a Special Verdict, That *J. S.* was seised of the Manor of *D.* in his Demesne as of Fee, of which Manor a Copyholder in the place where, *&c.* does waste by the cutting down an Oak; and that after *J. S.* dies, and the Lessor of the Plaintiff being his Cousin and Heir, enters into the Manor, and into the Place where, *&c.* for the said Forfeiture, and was of this seised in his Demesne, as of Fee, and concludes, *si super totam materiam*, &c. this is not a good Verdict, because it is not found that *J. S.* died seised of the Manor, and that this discended to the Lessor as his Cousin and Heir; for it may be *J. S.* alienated the Land, and that the Father of the Lessor, or the Lessor himself might repurchase it, and that he was also Cousin and Heir to *J. S.* for although it be in a Verdict, yet it shall not be intended, that the Fee continued in *J. S.* at his death, and that he died seised thereof without finding of it, *P.* 1 *Car.* 1. *Cornwallis* and *Hammond.*

N. B.

Karmion & Johnson: Styles Rep 281. 282.

Of

Of Uncertainty in Special Verdicts.

As to Persons.
As to Acres and Parcels.
As to the Place or Vill.
As to time.

As to Persons.

One deviseth all his Lands to *E.* his Wife for Life, the Remainder to *F.* his Daughter in Tail, the Remainder to the eldest Son of *William* his Brother in Tail, Remainder over. *E.* enters, *F.* dies without Issue; they find *Gertrude* Cousin and Heir to *F.* who levied a Fine, but they find not *Gertrude* was Heir to the Devisor; and it may be altho *F.* was the Daughter, the Devisor might have a Son, or that she was Heir to him by a second Wife, yet that Exception seemed not valid, *Cr. El.* 642. *Hemsley* and *Price.* So in 3 *Rep.* Sir *George Brown*'s Case, *Anthony* is found Son but not Heir, and yet without his being Heir, the Plaintiff had no Title: And yet in *Cymbal* and *Sand*'s Case, *Cro. Car.* 391. *Gimlet* and *Sands*, the Court seemed to be of Opinion, That tho' the Jury found that *Humfrey* had Issue by *Hebell* his Wife, *John, unicum filium suum*, that not finding that he was Heir (it was in case of his being Heir to a Warranty collateral) was not good; for he might have elder Sons by another *Venter*, or there might be an Attainder, or the Warranty might be discharged

Do not find Heir.

or

or releaſed io his Life-time, 2 *Rolls Abr.* 701. meſme Caſe.

The Jury found a Special Verdict on a Will, in which they found *A.* had Iſſue two Sons *B.* and *C.* and do not find which of them was the elder, and which the younger, which is material in the Caſe. This Verdict is not good; for tho' *B.* is firſt named, yet it doth not appear by this that he is the eldeſt Son, *M.* 20 *Jac. B. R. Peryn* and *Pearſe.*

Uncertainty as to part of a Houſe.

Part of an Houſe.

The Defendant pleads Not guilty; the Jury find him not guilty for part, and guilty *de tanto unius Meſſuagij in occupatione*, &c. *quantum ſtat ſuper Ripam. Per Cur'* the Verdict is inſufficient for the Uncertainty; for tho' the Certainty may appear to the Jury, yet that is not enough; the Court ought to give Judgment, *& oportet quod res deducatur in judicium.* Had they found him guilty of a Room, it had been good. So if he had been found guilty of a third part, for of them the Law takes notice. And an *Ejectione Firme* was brought for the Gate-houſe at *Weſtminſter*, and the Jury found the Defendant guilty for ſo much as is between ſuch a Room and ſuch a Room, and it was adjudged good, *Marſh. Rep.* 47. *Juxon* and *Andrews.*

The Court muſt be informed of the Certainty, and it ought to appear to them.

Guilty of a Room is good.

As

As to Certainty of Acres.

As to Acres. *Ejectione Firme* was brought of 400 Acres of Land; and the Jury find the Defendant *quoad* all besides three Acres parcel *tenementorum prædictorum* Not guilty; and *quoad* the three Acres, they find special matter; and that *G. A.* the Lessor let the aforesaid three Acres to the Plaintiff, and that he was possessed; and that the Defendant ejected him out of the three Acres, *parcel' tenementorum prædictorum*, and they did not find the *Ejectment* of the aforesaid three Acres, *&c.* and it may be the *Ejectment* was of other three Acres; and for this Cause *per totam Curiam* held ill, *Cr. El.* 642. *Hemsley* and *Price.*

Quoad, &c.

Parcel.

Ejectment of 5 Acres, if the Jury find the Defendant guilty in 8 Perches *de terre parcel' tenementorum prædictorum*, it's a void Verdict, because uncertain, and no Execution can be made of Pieces, 2 *Rolls Abr.* 694 *Pawlet* and Dr. *Redman.*

And this is the Difference between Trespass and Ejectment: The Plaintiff declares of Trespass in one Acre in *D.* and abutts it East, West, North and South. Upon Not guilty the Jury finds the Defendant guilty *in dimidio Acræ infra script'* the Plaintiff shall have Judgment; and so if they had found but one Foot of the Acre. And it sufficeth to be found in one Moiety of the Acre bounded in this Action, where Damages are only to be recovered. But if it were in *Ejectment* the

the Verdict had been ill; for it is not certain in what part the Plaintiff shall have his *Habere fac' possessionem*, *Yelv. p.* 114. *Winckworth* and *Man.*

It must be certain in what part the Plaintiff must have his *Hab. fac. possess.* *aliter* in Trespass.

In *Ejectione Firme* the Plaintiff declares of a Messuage, 3000 Acres of Land, 3000 Acres of Pasture in *D. per nomina* of the Manor of *Monkall*, and 5 Closes *per nomina*, &c. The Jury give a Special Verdict, *quoad* four Closes of Pasture containing by Estimation 2000 Acres of Pasture, that the Defendant was not guilty; *quoad residuum* they find the Matter in Law. This Verdict is imperfect in all; for when the Jury found the Defendant was not guilty of four Closes of Pasture containing by Estimation 2000 Acres of Pasture, it is uncertain, and doth not appear of how much they acquit him; and then when they find *quoad residuum* for the special Matter, it is uncertain what that Residue is; so there cannot be any Judgment given. And a *Venire fac' de novo* was awarded, *Cro. Jac'* 114. *Woolmer* and *Caston.*

Quoad residuum must be certain.

In *Ejectione Firme de septem Messuagiis sive tenementis*, and Verdict *pro Quer'*, it's ill for the Uncertainty, and the Verdict doth not help it. And *Hales* refused to let the Jury find for the Plaintiff for the Messuages, and *Non culp'* for the Tenements. But *per Twisden* had it been *de uno Messuagio sive Tenemento vocat' The Black Swan*, it had been good, because the last part makes it certain, *Sid.* 195. 2 *Keb.* 80. *Cro. El.* 186.

De Messuagiis sive Tenementis is ill, and the Verdict helps it not.

On Special Verdict in *Ejectment* the Case was, the Declaration was of several Messuages in the several Parishes of St. *Michael*, St.

As to Acres and Parishes.

James, St. *Peter* and St. *Paul*, and that part of the Premiſſes lie in the Pariſh of St. *Peter* and St. *Paul*, and that there is no Pariſh called the Pariſh of St. *Peter*, nor none called the Pariſh of St. *Paul*. *Per Cur'* the Copulative (*Et*) ſhall be referred to that which is real and hath exiſtence, *ut res magis valeat*; not to make St. *Peter*'s one Pariſh and St. *Paul* another, but to make them both one Pariſh, and the Words, *ſeveral Pariſhes*, are ſupplied by the Pariſhes before mentioned, as 6 *Ed.* 3. *Præcipe* of 10 Acres in *A. B.* and *C.* there the Lands muſt lie in every one of the Vills; but if the *Præcipe* were *de Manerio & de decem Acris* in *A. B.* and *C.* there it would be well enough, tho' the Manor lay elſewhere, provided that ten Acres lay within the Vills aforeſaid, for then the laſt words are ſatisfied by the ten Acres, *Hardr.* 1. 330. *Ingleton* and *Wakeman*.

Yet in *Thomas* and *Kenn*'s Caſe, *P.* 38 *El. B. R.* it's ſaid in *Dyer ult. Edit. in margine* 34. *b. Ejectione Firme* upon Title of Land of Sir *Hugh Portman*; the Count was of an hundred Acres in *D.* and *S.* and *Non culp'* pleaded, the Jury found the Defendant ejected him of ten Acres only, and ſhews not them in Certain, and adjudged a good Verdict, and the Plaintiff had Judgment.

Where ever but one Acre is found certain, one may releaſe all the reſt.

It's a Rule laid down, 1 *Rolls* 784. *Rhethorick* and *Chappel*'s Caſe, where ever an Acre is but found certain, a man may releaſe all the reſt that is uncertain, and nothing is more uſual.

Of

Of uncertainty in a Special Verdict, in reference to the Place or Vill.

Ejectione Firme of 30 Acres of Land in *D.* and *S.* The Defendant was found Guilty of 10 Acres, and *quoad reſiduum* Not Guilty. And it was moved in Arreſt of Judgment, That it was uncertain in which of the Vills thoſe Lands lay; and therefore no Judgment can be given: *Sed non Allocat.* and adjudged *pro Quer.* For the Sheriff ſhall take his Information from the party, for what 10 Acres the Verdict was. So is *Siderf.* 75. If one Declares for a 100 Acres of Land in two Vills, and the Jury find the Defendant Guilty, this is good without ſaying how many Acres lie in the Vill, and how many in the other: And the Sheriff ought to take notice of this at his Peril, in making of Execution. And ſo in *Dence*, and *Dence* his Caſe: It ſhall be intended, that every Acre of Land named in the Declaration lies in both Vills, for ſo much is preſumed by the Declaration, and the *Venire* from both Vills, *Cro. Car.* 467. *Portman* and *Morgan*, *Sid. p.* 75. *Yelv.* 228. *Dences's* Caſe.

Acres in two Vills, and the Jury found the Defendant Guilty, and ſay not how many lie in one Vill, and how many in another.

Trin. 43. *El. Meredith* and *Brown.* It was adjudged in *B.R.* that in *Ejectione Firme*, ſuppoſing the Ejectment of 10 Acre, and the Jury find the Circumſtances but of 4 Acres, the Plaintiff ſhall recover theſe 4 Acres. But Dame *Baskervile's* Caſe was in 39 *Eliz.* Aſſize was brought of a Park containing 60 Acres, and the Jury found the Diſſeiſin

but of 30 Acres, and adjudged againſt the Plaintiff for all. But note, the Park was entire, *Dyer* 15. *b.*

As to time.

It was a great Caſe between *Vernon* and *Gray*. The Ejectment was ſuppoſed the firſt of *May*; and the Jury found the Ejectment to be *circa* the firſt of *May*. It was held not good, *Godb.* 125. cited in *Tarran* and *Bradſhaw*'s Caſe.

Of a Verdict in other Leaſes, or Date than is declared upon.

Jury find on a Demiſe generally.

The Plaintiff Declares of a Leaſe by two Copyhold-Lords, Leſſors of the Plaintiff for a Term certain; and the Jury find a Demiſe generally, and do not find the Leaſe whereupon the Plaintiff Declares, and it may be any other Leaſe which might not be determined at the time of the Verdict, but is now ſince; and the Ejectment is only found out of this, and not on the Leaſe declared on, 19 *Car.* 2. *B. C. Lenthal* and *Thomas*.

Count of a Leaſe for years in Poſſeſſion, the Jury found the Leaſe made on another Day, its againſt the Plaintiff. *Aliter*, if it be made to commence at a Day to come.

In Ejectment, if the Plaintiff Declares of a Leaſe for years made the firſt of *May*, to commence at the firſt of St. *Michael*, then next enſuing (which is now paſt) if the Jury find that the Leaſe was made the firſt of *June*, or at any other Day before the Feaſt of S. *Michael*, This is found *pro Quer.* For the Day

Day of the making is not material, ſo that it was made to commence at a Day to come. By *Foſter* its the common practice, 1 *Rolls Abr.* 704.

But if in Ejectment the Plaintiff Declares of a Leaſe for years in Poſſeſſion ſuch a Day, and the Jury find the Leaſe to be made at another Day; this ſhall be found againſt the Plaintiff, becauſe it is not the ſame Leaſe. So it is,

If a Man in an *Ejectione Firme*, Declare of a Leaſe made the 5*th* of *May*, 10 *Jac. Habend.* from the Annunciation before for three years. And the Jury found the Leaſe to be made the 15 Day of *May*, 10 *Jac. Habend.* from the Annunciation before (being the ſame *Lady-day*) for three years: This is found againſt the Plaintiff, becauſe this was a Leaſe in Poſſeſſion at another Day (*ſcilicet* 15 of *May*) than the Plaintiff had counted, altho' it had the ſame Commencement. But in *Muſgraves's* Caſe it was, The Leaſe in the Declaration was a Leaſe made the 5 of *May*, 10 *Jac. Habend.* from the Feaſt of the Annunciation then laſt paſt for 21 years *extunc ſcilicet*, from the Feaſt of the Annunciation next enſuing. But the Leaſe found by the Jury, was a Leaſe made the ſaid 5 of *May*, 10 *Jac. per Indent.* bearing Date the ſaid 5 Day of *May*, *Anno* 10 *Jac. Habend.* from the Feaſt of the Annunciation *beate Marie Virginis tunc ultimo preterito pro termino* 21 *annorum prox ſequen' dat' dicte Indenture.* It was adjudged *pro Quer.* and ſo affirmed in a Writ of Error. But I conceive this Caſe is beſt reported by *Allen.*

The Plaintiff declared, That *J. S.* the 5 of *May*, 10 *Jac.* demiſed a Houſe to him, *Habend.* from the Feaſt of the Annunciation laſt paſt, for 21 years *extunc prox. ſequend.* and the Defendant the ſame 5 Day of *May* ejected him. And upon Not Guilty the Jury found, that *J. S.* the ſaid 5 of *May* by Indenture bearing Date the 4 of *May*, demiſed the Houſe to the Plaintiff *Habend.* from the Feaſt of the Annunciation laſt paſt, for 21 years next enſuing the Date hereof fully to be compleat and ended. And upon the Verdict the Plaintiff had Judgment, which was affirmed in *Scaccario*. The Term began from the Feaſt of the Annunciation, in Computation of the 21 years, and on the 5 of *May*, in point of Intereſt, *Allen p.* 77.

The Plaintiff muſt make his Title truly.

In *Pope* and *Skinner's* Caſe, The Plaintiff Declares of a Leaſe made to him the 30 Day of *March*, 11 *Jac. Habend.* from the Feaſt of the Annunciation next before for a year. The Defendant Traverſeth the Leaſe *modo & forma*. The Jury find a Leaſe to the Plaintiff on the 25 Day of *March* for one year, from thence next enſuing: This is againſt the Plaintiff, for being in *Ejectione Firme*, he Demands and Recovers the Term, and therefore muſt make his Title. *Alister*, in Replevin, *Hob. pag.* 73. *Pope* and *Skinner.*

Ejectment of a Leaſe made the 12 of *December*, *Habend. à primo die.* On Not guilty, The Jury found a Leaſe made in *hac verba*, which was dated the 1 of *December*, *Hab.* from

from henceforth, but delivered the 12 of *December*. It was objected, That from the Day of the Date, and from henceforth are ſeveral Commencements, for the one begins the Day it was Sealed, the other the Day after. But *per Cur.* They are both one, being a computation of time from the time paſt; and both ſhall be pleaded to begin from the Day of the Date, when the Leaſe is afterwards Sealed at another Day; and if the Leaſe be made the 1 of *December*, *Hab.* henceforth, the Ejectment may be alledged the ſame Day. *Aliter*, If it be *à die datus*. *Pro Quer. Cr. Jac.* 258. *Lewellin verſus Williams.*

Habend. henceforth.

Verdict finds, that the Leſſor of the Plaintiff was ſeiſed in Tail of the Rectory, &c. and does not ſhew the beginning of the Eſtate Tail, which is the particular Eſtate. *Per Cur.* It is an apparent fault, *Cr. Eliz.* 407. *Baker* and *Searle.*

The Averment of the Eſtate Tail to be found.

In the ſaid Caſe where the Party comes in by a Limitation of an Uſe, the Verdict ſaith, *virtute cujus dimiſſionis*, and it ought to have been *& virtute Statut. Per Cur.* This is an apparent fault in Subſtance and Form.

Where when the party comes in by Limitation of Uſe, it muſt ſay, *virtute Statut.*

The Iſſue in Ejectment was, if *Julian* the Wife of the Defendant was alive at ſuch a time; and the Jury found, that *Jenimet* the Wife of the Defendant was alive at ſuch a time. *Per Cur.* They ſhall not be adjudged one and the ſame Perſon, without finding alſo by the Cuſtom of the Country, that Women baptiſed by the name of *Julian*, have been alſo called *Jenimet*, *Moor* 411. *No.* 560. *Huntbach* and *Shepard.*

Diverſity of names.

Verdict as to Baron and Feme.

In *Ejectione Firme* againſt Baron and Feme. On Not guilty pleaded, and a *Venire fac'* granted, the Jury found the Wife Not guilty, and found a Special Verdict as to the Huſband, which Special Verdict is afterwards adjudged inſufficient by the Court. A *Venire fac' de novo* ſhall be awarded for both, as well for the Wife as the Husband, and upon this new Writ the Wife may be found Guilty, becauſe the Record and Iſſue is intire; and for this their Verdict is inſufficient in all and void, 2 *Rolls Abr.* 722. *Langly* and *Pain.* So in *Swan's* Caſe, *Stiles* 412. Ejectment againſt Baron and Feme, and the Feme is found Ejector by the Verdict, and nothing is found concerning the Husband, and a *Venire fac' de novo* was awarded, unleſs they will agree to amend the Verdict according to the Notes.

Wife found Not guilty, and Special Verdict as to the Husband.

Venire de novo.

Where, and in what Caſes Special Verdicts may be amended.

Where a Special Verdict is not entred according to the Notes, the Record may be amended, and made agree with the Notes at any time, tho' it be 3 or 4 Terms after it is entred, 4 *Rep.* 52. 8 *Rep.* 162. *Cr. Car.* 145.

Record of a Special Verdict amended.

And

And where a Verdict is certainly given at the Tryal, and uncertainly returned by the Clerk of the Aſſizes, *&c.* the *poſtea* may be amended, upon the Judges certifying the truth, how the Verdict was given, *Cr. Car.* 338.

Poſtea where amended.

The Plaintiff was Non-ſuited at the Aſſizes, for default of the Warrant of the Juſtices to try the Cauſe, (*viz.*) for not conſeſſing Leaſe Entry and *Ouſter*, and prayed that the Non-ſuit might not be Recorded, which the Court granted, and an *Alias Diſtringas*, 1 *Keb.* 508. *Pits* and *Viner*, *Cro. Car.* 203. *Aquila Wicke*'s Caſe.

Non-ſuit for default of Warrant to try the Cauſe not Recorded.

If the Plaintiff makes Title upon a Demiſe made by *Tho. Bill* and *Agnes* his Wife, and the Parties are at Iſſue, and the Record of *Niſi prius* was entred by the Clerk, that the ſaid *Tho. Bill*, and *Anne* his Wife made the Demiſe, *&c.* ſo that the Record of *Niſi prius* differs from the Roll; this ſhall not be amended, for if the Record ſhould be amended, the Jury ſhould be attaint, in as much as they found a Leaſe made by *Tho. Bill* and *Agnes* his Wife; and peradventure this Leaſe will not prove a Leaſe, by *Tho. Bill* and *Anne* his Wife, 1 *Rolls Abr.* 202. *King* and *King*.

Record of *Niſi prius*, variance from the Roll not amendable.

CHAP.

CHAP. XIII.

Where the Defendant ſhall have Coſts, and Damages. How the Plaintiff may aid himſelf by Releaſe of Damage. Executor not to pay Coſts. Leſſor of the Plaintiff to pay Coſt. Where Tenant in Poſſeſſion liable to pay Coſts or not. Feme to pay Coſts on Death of her Husband. Infant Leſſor to pay Coſts of the Writ of Enquiry. The Entry. Writ of Error Lies upon the Judgment, before the Writ of Enquiry, and why. Writ of Enquiry how abated.

The Jury are to find Coſts and Damages in Debt, Treſpaſs, Ejectment, &c.

Regular. IF the Plaintiff miſtake his Declaration, the Defendant ſhall have Coſts. The Plaintiff may relinquiſh his Damages, where part of the Action fails, and take Judgment for the other. And ſo is the Rule, If part of the things Demanded in this Action are well demanded, and part of the things demanded are not well demanded, and Verdict is given for the Plaintiff for the whole, and entire Damages are given, The Plaintiff may releaſe all the Damages in that which is not demanded, and pray Judgment for the Reſidue; and this ſhall aid Error if Judgment be given accordingly. As in *Ejectione Firme* of a Meſſuage, Cottage and Tenement, if it be found for the Plaintiff, and entire Damages given for the wole,

Releaſe of Damages.

whole, becauſe *Ejectione Firme* does not lie of a Tenement, the Plaintiff may releaſe all the Damages, becauſe it is entire, and have Judgment for all the Land ſaving the Tenement; and this ſhall not be Erroneous. So in Ejectment of Land, and *de libertate Piſcarie*, for *libera Piſcaria*, which is not good, the Plaintiff may Releaſe all the Damages, and have Judgment for the Land only, altho' he cannot be ſaid properly to Releaſe Damages, as to the *Piſcbary* where none were, *Godb. pag.* 354. *No.* 429. 1 *Rolls Abr.* 786. *Clive* and *Vere.* 1 *Rolls Abr.* 784, 786. *Retorick* and *Chappel.*

Ejectment was for Entry into a Meſſuage *ſive tenementum*, and 4 Acres of Land to the ſame belonging. As to the Meſſuage *ſive tenementum*, The Declaration is uncertain, and if the Damages are Releaſed, the Coſts are gone alſo. It is uncertain to which the 4 Acres belong, *i. e.* to the Meſſuage or Tenement. But *per Cur.* as to the 4 Acres its certain enough, and the words (to the ſame belonging) are merely void, 3 *Leon. p.* 228. *Wood* and *Pain.* Warranty.

In Ejectment Judgment is againſt the Defendant who dies, and his Executor brings a Writ of Error and is Non-ſuited. He ſhall not pay Coſts; an Executor is not within the Statute for paying of Coſts, *Occaſione dilationis*, *Mod. Rep.* 77. Executors not to pay Coſts.

In Ejectment againſt 2. *A. B.* they prayed to be made Defendants, and were ſo, confeſſing Leaſe, Entry and Ouſter, and at the Tryal *A.* confeſſed ſo much as was in his Poſſeſſion for certain; but *B.* would not proceed

proceed with him, and the Plaintiff was Non-suit against both. He that tried it prayed Costs, which the Court granted, but they must joyn in the Suit of Execution for Costs, 2 *Keb.* 219. Sir *Cyril Wych*'s Case.

Feme liable to pay Costs on Baron Death.

The Lessor of the Plaintiff in Ejectment shall be liable to Costs, the Lease being made by Baron and Feme; on his Death she is liable as well as other Joyntenant Surviving, 1 *Keb.* 827. *Morgan* and *Stapel*'s Case.

The Lessor of the Plaintiff where to pay Costs.

The Lessor of the Plaintiff by several Rules of Court on Demand, ought to pay Costs upon the Insufficiency, or Skulking of the Plaintiff in Ejectment, 1 *Keb.* 17.

Tenant in Possession liable to pay Costs by the Law.

The Lessor of the Plaintiff is liable to pay Costs (tho' he shall never be forced to give Security for them) but the Lessor of a Tenant in Possession is not liable to Costs, because tho' he may come in *gratis* and defend his Title, yet the Tenant in Possession, is only liable to pay Costs by the Law. But only by the Course of the Court, unless the Tryal be by the Lessors means brought to the Bar, and then he shall never have a second Tryal at Bar, before he hath paid the Costs of the former Tryal; but yet the Court for Non-payment of Costs, will not hinder proceedings in the Country. *Per Cur.* 1 *Keb.* 106. *Latham*'s Case.

In Judgment against his own Ejector, no Cost to be paid by the Tenant in Possession.

Note, Upon a Judgment against his own Ejector in default of confessing Lease, Entry and Ouster according to Rule of Court, without Special Rule no Costs shall be paid, by *H.* The Tenant in Possession that made the default, &c. *Contra*, upon Tryal had against *H.*

because

becauſe the Plaintiff hath the Benefit of the Suit, *viz.* Judgment againſt his own Ejector, whereby he may recover the Poſſeſſion, 1 *Keb.* 242.

Verdict was for the Defendant, and the Plaintiff to ſave his Coſts, alledged, That the *Venue* was miſawarded, and that there was a Fault in the Declaration; but reſolved *per Cur'* the Defendant ſhall have his Coſts, 2 *Rolls Rep.* 327. *Pritchard* and *Reynell. Palmer* 365. meſme Caſe,

Allegation by the Plaintiff to ſave his Coſt, not allowed.

The Plaintiff in *Ejectment* was nonſuited, which was recorded, and the Defendant ſued for Coſts upon the *Stat.* 4 *Jac. c.* 3. The Plaintiff alledgeth inſufficiency in his own Declaration to avoid Coſts upon the Words of the *Stat. That in* Ejectione Firme *and every other Action where the Plaintiff might recover Coſts*, &c. If it had been found for him, that then upon Nonſuit, *&c.* in every ſuch Action the Defendant ſhall have Judgment to recover Coſts againſt him; and the Plaintiff pretends in ſuch Action he cannot recover where the Declaration is not ſufficient. But *per Cur'* there is no reaſon the Plaintiff ſhould take Advantage of his inſufficient Declaration, *Palmer's Rep.* 147. *Dove* and *Knapp.*

The Plaintiff not to take advantage of his own inſufficient Declaration.

Debt was brought on the *Stat.* of 8 *Eliz.* for Coſts in an *Ejectione Firme*, the Plaintiff being nonſuited, ſuppoſing the Statute to be made *ad Parliamentum tentum* 8 *Eliz.* whereas the Parliament began *Anno quinto*, and by Prorogation was held in 8 *Eliz.* ſo it ought to have been *ad Seſſionem Parliamenti tent' Anno octavo Eliz.* and ruled to be ill, *Cro. Jac.* 111. *Ford* and *Hunter.*

Coſts on *Stat.* 8 *Eliz.* on Nonſuit, and the *Stat.* miſtaken.

If

Costs for want of Continuances entred.

If no Continuance be entred, then a Di continuance may be entred, and he may re cover Costs in Ejectment, 2 *Bulstr.* 63.

When Nonsuit shall be for want of a Declaration.

Per Stat. 13 *Car.* 2. *c.* 11. Nonsuit shall b for want of a Declaration before the end o the next Term after Appearance, and Judg ment and Costs against the Plaintiff, *Sta* 13 *Car.* 2. *c.* 11.

There need not be 15 days between the Teste-day and Day of Retorn.

In all personal Actions, and in *Ejectio Firme* for Lands, *&c.* depending by Origina Writ, after any Issue therein joyned, an also after any Judgment had or obtained there shall not need to be Fifteen Days be tween the Teste-day and Day of Retorn o any Writ of *Venire fac'*, *Habeas Corpus*, *Jura Distringas Jurat'*, *Fiere fac'* or *Cap' ad sat'* and the Writ of Fifteen days between the Teste-day and the day of Retorn of any such Writ, shall not be assigned for Error, *Sta* 13 *Car.* 2. *c.* 11.

Infant Lessor pays Costs.

Infant Lessor in *Ejectment* shall pay Costs 3 *Keb.* 347. *Masten* and *King*.

Upon a Verdict against all Evidence the Court will tax Costs, and will not suspend it till a new Tryal, 1 *Keb.* 294.

If the Defendant, whose Title is concerned in an *Ejectione Firme*, will not defend his Title to the Lands in Question, and the Verdict do pass against the Plaintiff, the Ejector may release the Damages, *Pr. Reg.* 100.

The sole Remedy for Costs in the first Tryal is by Attachment, unless

Note, This Rule, as to paying of Costs, if a Man had a Verdict in *Ejectment*, and Costs taxed, and an Attachment for not paying them; and whereas he cannot procure them

the second Tryal be in the same Court after a Verdict.

of him who ought to pay them, he ſues the ſame Party for the ſame thing again in an other Court, and he ſhews this by Motion, and prays he may not proceed till Coſts paid; yet the Court will not grant it, but he ought to reſort to the Remedy of the Proceſs of the Court where he recovered for theſe Coſts; and ſo it is if it was in the ſame Court for Coſts for not going on to Tryal; but if it were for Coſts after a Verdict in the ſame Court, there upon Affidavit of this, it's good Cauſe to ſtay the ſecond Tryal for the ſame thing, unleſs the Coſts of the firſt be paid, *Sid. p.* 229. *Auſtin* and *Hood.*

Where Coſts are confeſſed on Leaſe, Entry and Ouſter, *&c.* and that the other did not.

Upon a Tryal at Bar in *Ejectment* where two were made Defendants, and had entred into the Common Rule; and at the Tryal one appeared and confeſſed Leaſe, Entry and Ouſter, but the other did not; and after Evidence given, the Plaintiff was Non-ſuited, and Coſts taxed for the Defendants. *Per Cur'* both theſe Defendants are intitled to the Coſts, and he that did not appear, might releaſe them to the Plaintiff. But the Court ſaid, If there ſhould appear to be Covin between the Leſſor of the Plaintiff and the Defendant, who did appear to releaſe the Coſts, they would correct ſuch Practice when it ſhould be made to appear, 2 *Ventr.* 2. *W. & M. Fagge* and *Roberts.*

Berkley had Judgment in *Ejectione Firme* in *C. B.* and Execution of his Damages and Coſts. *Foot* brings Error, and the Judgment is affirmed; whereupon *B.* prays his Coſts for Delay and Charges, but could not have them, for no Coſts were in ſuch Caſe at Com-

Common Law. And *Stat.* 3 *H.* 7. *c.* 10. gives them only where Error is brought in delay of Execution, and here tho' he had not Execution of the Term, yet he had it of his Coſt, 1 *Ventr.* 124.

Adminſtrator brought a Writ of Err orupon a Judgment given in Ejectment againſt the Inteſtate. *Per Cur'* he ſhall pay no Coſts, tho' the Judgment was affirmed, and the Writ brought in *Dilatione executionis*, 1 *Ventr.*

Writ of Inquiry.

The Entry.

It was aſſigned for Error, That a Writ of Enquiry of Damages was awarded, and no day given to any of the Parties to be there at the time of the Retorn; for the Entry ought to be, *Ideo dies datus partibus prædictis*, or at leaſt to the Plaintiff, that ſo he might then pray his Judgment, *ſed non allocat'*, for the Defendant is not to have day, and the Plaintiff is to attend at his Peril; and ſo is the Courſe of the *Common Pleas*, *aliter* in the *King's Bench*, *Cro. El. p.* 144. *Mathew* and *Haſſel.*

E. in *Ejectione Firme* had Judgment by Default againſt the Defendant; whereupon a Writ of Enquiry iſſues out to enquire of the Damages, and before the Retorn thereof the Defendant brought a Writ of Error, the Queſtion was, Whether the Writ of Error were well brought, in regard the Courſe of the *Common Pleas* is not to make up the Judgment, until the Writ of Enquiry be returned. *Rolls* ſaid, A Writ of Error may be brought

brought before the Writ of Enquiry be retorned in *Ejectione Firme*, for in that Action the Judgment is compleat at the Common Law before it be retorned; for the Judgment is but to gain Poſſeſſion, and ſo it is in a Writ of Dower. But in an Action of Treſpaſs where Damages are only to be recovered, there the Judgment is not perfect, till the Writ of Enquiry be retorned, nor can be made up, as in this Caſe it may. But in regard that here is no compleat Judgment, for there is no *Capias*, which ought to be in all Actions *Quare vi & armis*, that the King may have his Fine, which elſe he cannot have, if the Party do not proceed in his Writ of Enquiry, the Writ of Error is brought too ſoon, and you may proceed to Execution in the *Common Pleas*, for the compleat Record is not here. Afterwards in another Caſe *Rolls* was of Opinion, That it was a perfect Judgment; and it is in your Power (ſaid he to the Defendant's Council) whether you will have a Writ of Enquiry or not; and if the Judgment be affirmed here upon the Writ of Error brought, you may have a Writ of Enquiry in *B. R.* the Council therefore moved for a *Certiorari*. *Rolls*; take it, but it will do you no good, for the Judgment is well, *Stiles Rep. Glide* and *Dudenn's* Caſe. *p.* 122. *Crook* and *Sanny*. *Stiles* 127.

The Writ of Error lies upon the Judgment before the Retorn of the Writ of Enquiry, and why.

This Point is ſetled now in both Courts. In *Ejectione Firme* if the Plaintiff recover by *Nihil dicit*, in which Judgment is given, that the Plaintiff ſhall recover his Term, and a Writ is awarded to enquire of Damages, a

Writ of Error lies upon this Judgment before the Retorn of the Writ of Enquiry of Damages, and Judgment upon it, for the Judgment is perfect as to the Recovery of the Term before by the first Judgment, and the Plaintiff may presently have Execution for the Possession; and peradventure he never will have Judgment for the Damages, and so the Defendant shall be ousted of his Possession *sans Remedy*. So it is if a Man recover in *Ejectione Firme* by Confession, or *non sum informatus*, or Demurrer, a Writ of Error lies before the Damages taxed by Writ of Enquiry, 1 *Rolls p.* 750, 751. *Newton* and *Terry*, *Taverner* and *Fawcet*, *Booth* and *Errington*. 5 *Rep. Wymarth*, and *House* and *Layton*. *Latch. p.* 212.

Abatement by Death after Judgment or pendant Error, but not after Affirmance.

Council prayed Abatement of a Writ of Enquiry on 16 and 17 *Car.* 2. *c.* 8. by Affidavit of *Cesty que vie's* Death after the Judgment two days; and by the Act from the Judgment affirmed in Error, which was a Term after, which the Court granted. But it were better the mean Profits were recoverable in Ejectment by the same Verdict. *Wild* held this should be given in Evidence on the Writ of Enquiry, but being no Bar but in mitigation, that is not sufficient; and it was staid, *Warren* and *Orpwood*. *M.* 25 *Car.* 2. *B. R.* 3 *Keb. p.* 218.

CHAP.

CHAP. XIV.

Of Judgment in Ejectment and Execution. The Form of entring Judgment in this Action. How the Entry is when part is for the Plaintiff, and part against him. How against several Ejectors. The Form of the Entry in case of Death of the Plaintiff or Defendant. After Verdict and before Judgment the Plaintiff dies. Ejectment for the whole, and no Title but to a Moiety. For what Causes Judgments in Ejectment are arrestable or erroneous. In what Cases Judgment shall be amended. Of Judgment against ones own Ejector.

Note, NO Judgment in Ejectment till *Latitat* filed, and Bail, 2 *Keb.* 743.

The Form of entring Judgments in this Action.

In *Cr. El.* 144. *Matthew* and *Hassel*'s Case. It was assigned for Error, That the Judgment was, *Quod recuperet possessionem termini prædict'*, where it should be, *Quod recuperet terminum*; for as in a Real Action he is to recover Seisin, so in a Personal he is to recover Possession, and the Writ is *habere fac' possessionem*, 1 *Leon. p.* 175. mesme Case. *Quod recuperet possessionem termini.*

All the Course of Entries, when part is found for the Plaintiff, and part against him, is to enter only, *Quod Def. eat inde sine die quoad*, &c. whereof he is acquitted. It was *Taylor* How the Entry is when part is made *pro Quer'*, and part against.

Taylor and *Woldboro's* Case, *Cr. El.* 768. Error of a Judgment in Ejectment was brought, because the Defendant was found Not guilty *quoad* a third part; and the Judgment is entred thereupon, *Quod Def. eat inde sine die & quer' in misericordia*, &c. whereas it ought to have been, *Quod le Plaintiff nil capiat per Billam* for that third part, *sed non allocatur causa qua supra*, *Cro. El.* 768. and the Court would have affirmed the Judgment, but because the Plaintiff had not appeared that Term, they caused him to be nonsuited.

Quod Def. sit quietus.

In 1 *Rolls Rep.* 51. Error was assigned because the Judgment in *Ejectione Firme* in *Wales* was *Quod Def. sit quietus*, such Judgment being only given in a Writ of Right and such Actions which are final; but this Action is not final, and the Judgment should be *Quod Def. eat inde sine die*, Sir *William Mo-ris* and *Cadwallader's* Case.

Quod Def. remaneat indefens'.

In *Ejectione Firme*, if upon *Non sum informatus* pleaded, Judgment be given, *Quod Def. remaneat indefensus*, without saying *versus querent'*, yet its good, 1 *Rolls Abr.* 772. *Fiegot* and *Mallory*.

Against several Ejectors.

Ejectment was against several Defendants, *&c.* they were fined severally, where the Ejectment was against them all joyntly; but because they were found several Ejectors of several Parcels, the Judgment was good (*scilicet*) *quilibet capiatur quoad* his Parcel; and if it had not been joynt, it had not been been sufficient, *Bendl.* 83. *Darcy* and *Mason*.

The

The Plaintiff shall be in *Misericordia* but once. As Ejectment with Force, three of the Defendants were found Guilty of the House, and ten Acres of Land, and Not guilty for the Residue. The fourth Defendant is found Not guilty generally. And Judgment was entred, That he should recover his Term in the House and ten Acres of Land, and Costs against the three Defendants, and that the said three Defendants *capiantur*, and that they be acquitted *quoad residuum*, and that the Plaintiff *quoad* the three Defandants *pro falso clamore* for so much as they were acquitted; *& pro falso clamore*, against the fourth Defendant, *sit in Misericordia*. Its good enough, and the course, that the Plaintiff in such Cases be in *Misericordia* but once, which is specially entred, *Crok. Car.* 178. *Dockrow*'s Case.

The Plaintiff shall be in *Misericordia* but once.

In *Croke* and *Sam*'s Case, *Stiles* 122. 346. The Judgments was; *ideo considerat' est qd. recuperet*, and there wants, *& Def. capiatur*, it is Erroneous.

Form of the Entry in Case of the Death of the Plaintiff or Defendant.

Note, That 3 Plaintiffs in Ejectment were, and on general Issue it was found for the Plaintiffs. And 4 days after the Verdict given, was moved to stay Judgment, a Special matter in Law, whereof the Justices were not resolved, and gave day over, and in the mean time one of the Plaintiffs died. This shall not stay Judgment, for the *Postea*

One of the Plaintiffs died during a *Curia advisare*.

came in 15 *Paſ.* which was the 16 of *April*, at which Day the Court ought to give Judgment preſently. But *Cur. adviſare vult*, and on the 19 of *April* one of the Plaintiffs died, and the favour of the Court ſhall not prejudice; for the Judgment ſhall have relation to the 16 day of *April*, at which time he was alive, 1 *Leon.* 187. *Iſley*'s Caſe.

The Death of one Defendant ſhall not abate the Writ.

In Ejectment two Defendants were found Guilty, and the other not. The one that is Not guilty dies, The Plaintiff ſhave Judgment againſt the other: So it is, if he that is Dead had been Guilty, becauſe this Writ is but as a Treſpaſs, where the Death of one Defendant ſhall not abate the Writ, *Moor* 469. 673. *Griffith* and *Lawrence*'s Caſe.

Ejectione Baron and Feme, Baron dies.

Ejectione Firme againſt Baron and Feme. And Verdict *pro Quer.* and after between the Verdict and day in *Banco* the Baron dies, and therefore the Court in *Lee* and *Rowley*'s Caſe, 1 *Rolls Rep.* 14. adviſed the Plaintiff to relinquiſh this Action, and only to enter the Verdict for Evidence; for if Judgment is given againſt the Defendant, and one is dead at the time of the Judgment, then this will be Erroneous, *per Dodderidge* and *Mann Preignotary*. But *Coke* ſaid, The Plaintiff may make allegation that the Husband is dead, and ſhall have Judgment againſt the Wife. And it hath been adjudged lately, Ejectment againſt Baron and Feme, which are but one perſon in Law; yet, if the Husband dies, the Suit ſhall proceed againſt the Wife, *Hardr.* 61. But in *Rigley* and *Lee*'s Caſe, *Cr. Jac.* 356. Ejectment againſt Baron and

and Feme, after Verdict Baron dies before the day in *Banco*, becauſe it is in the nature of a Treſpaſs, and the Feme is charged for her own fact. *Per Cur.* The Action continues againſt the Wife, and Judgment ſhall be entred againſt herſelf, becauſe the Baron was dead.

Record where not to be amended.

Ejectment againſt divers, all plead Not guilty; and divers Continuances were between them all, where *revera*, one of the Defendants was dead after Iſſue joyned, and a Verdict was after found *pro Quer.* and the Record was moved to be amended. *Per Cur.* we cannot do it. After Verdict and before Judgment the Plaintiff may ſurmiſe, that the Defendant was dead before the Verdict and Continuance was againſt him, as in full Life, *Jones* 410. Sir *John Fitzherbert verſus Leech.* And

One Defendent dies after Iſſue joyned.

Suggeſtion entred on the Roll, one Defendant being dead after Non-ſuit.

In Ejectment to try the Cuſtom of Copyhold. The Plaintiff was Non-ſuit, and one of the Defendants being dead. *Hales* Chief Juſtices, adviſed to Enter a Suggeſtion on the Roll that one was dead; elſe the Judgment for the Defendants on the Non-ſuit, will be Erroneous as to all, *M.* 23 *Car.* 2. *B. R. Hawthorn* and *Bawdan.*

Ejectment againſt ſeven, and one dies hanging the Writ and Error brought.

Ejectment was brought againſt ſeven, one dies, hanging the Writ; and the Judgment was given againſt the ſix, without ſpeaking any thing of the ſeventh, where the Judgment ought to be againſt them that were in Life, and a *nil cap.* as to him that was dead. Otherwiſe, there is a variance between the Writ and Judgment: And a Writ of Error was brought, but it was not

well brought; for the ſeventh joyned in the Writ of Error, which was *ad grave damnum* of all the ſeven. But had it been omitted *ad grave damnum* of him that was dead, it had been good, 2 *Rolls Rep.* 20. *Bethell* and *Parry*, *Pal.* 152. *Meſme* Caſe.

After Verdict and before Judgment the Plaintiff dies and Judgment his given for him the ſame Term.

In *Hide* and *Markham's* Caſe it was Ruled, That if one bring *Ejectione Firme* in *B.R.* and there had a Verdict in a Tryal at Bar; and after, before Judgment he dies, and after the Judgment is given for him the ſame Term; this is not Error, for that the Judgment ſhall relate to the Verdict. But if the Verdict paſs againſt the Plaintiff at the *Niſi prius*, and after, before the Day in Bank he dies, and after Judgment is againſt him; this is Error, for as much as Judgment is given againſt a dead Man, 1 *Rolls Abr.* 768. and *Jurdan's* Caſe, *ibid.*

The Plaintiff dies after Verdict and Judgment was not ſtaid and why.

The Plaintiff in Ejectment dies. *Addiſon's* Caſe, *Mod. Rep.* 252. Yet as that caſe was the Court would not ſtay Judgment, for between the Leſſor of the Plaintiff and the Defendant, there was another Cauſe depending, and tried at the ſame Aſſizes when this Iſſue was tried, and by Agreement between the Parties, the Verdict in that Cauſe was drawn up, but agreed it ſhould enſue the Determination of this Verdict, and the Title go accordingly: Now the ſubmiſſion to this Rule was an implicit Agreement, not to take advantage of ſuch occurrences as the death of the Plaintiff, whom we know no ways to be concerned in point of Intereſt and many times but an imaginary perſon. (*Per Cur.* We take no notice judicially, that the

the Leſſor of the Plaintiff is the Party intereſted, and therefore we puniſh the Plaintiff, if he Releaſe the Action, or Releaſe the Damages.) It was ſaid too in behalf of the Judgment, That there was a Man of the ſame name in the County with him that was made Plaintiff: And by the Court that is ſufficient, and the Court ſhall intend it to be him, were there any one of the ſame name in *rerum natura*.

What notice the Court takes of the Leſſor of the Plaintiff.

It is ſaid in *Cooper* and *Franklin*'s Caſe. If one brings *Ejectione Firme* for the whole, having Title but to a Moiety, that is hath been adjudged againſt *Bracebridges*'s Caſe, in *Plowd.* He ſhall have Judgment for a Moiety, 3 *Bulſtr.* 185.

Ejectment for the whole, and a Title but to a Moiety, Judgment ſhall be for the whole.

In what Caſes, and for what Cauſes Judgments in Ejectment are Arreſtable or Erroneous.

In *Savern* and *Smith*'s Caſe, Judgment was *de integris tenementis*, where it ought to have been for a Moiety; The Judgment was given for the whole, and intire Damages aſſeſſed by the Jury. Its Error, *Croke Car.* 7.

Judgment for the whole where it ought to be for a Moiety.

The Declaration was, *Qd. per Indentur. dimiſit decimas garbar. Rectorie de*, &c. *una cum quodam horreo & gardino eidem Rectorie pertin.* And the Judgment on Demurrer on the Plea was, *Ideo*, &c. *qd. præd. Querens recuperet verſ. præfat Def. terminum ſuum prædict. adhuc ventur' de & in Rectoria horreo & gardino præd. cum pertin. & damna ſua.* And more Damages is found in the return of the Inquiſi-

More Damages found than the Plaintiff counts.

Inquiſition, than the Plaintiff counts. And the intire Rectory was not Let, and no Term ſuppoſed in it in the Declaration, but in the ſaid three particulars, and no expreſs Judgment is given for the Tithes and Damages are aſſeſſed for the expulſion of the intire Parſonage, of which there was no complaint. It ſeems its Erroneous, *Dyer* 258. *Plow.* 19. 1 *Bulſtr.* 49. 10 *Rep.* 117. 3 *Cr.* 544.

Againſt Gardian and Infant *qd. capiantur.*

Ejectione Firme was brought againſt four, whereof one was an Infant, and appeared by his Guardian, and Verdict was *pro Quer.* and Judgment againſt them *quod capiantur.* But no ſuch Judgment ought to be againſt an Infant, and its Error, and Judgment was reverſed, *Cr. Jac.* 274. *Holbrook* and *Doyle's* Caſe.

Infant appeared be Attorney

C. One of the Defendants at the time of the Judgment, was within Age, and appeared by Attorney, where it ought to have been by his Guardian, the Judgment being upon Verdict. *Per Cur.* Its Error; and in regard Damages and Coſts are intire, the Judgment ſhall be reverſed for both, by the *Stat.* 21 *Jac.* 13. Judgment ſhall not be Arreſted, for that the Plaintiff in any *Ejectione Firme*, or in any perſonal Action being under Age did appear by Attorney, and the Verdict did paſs for him.

Not ſevering and intire Damages.

Judgment was reverſt in Error of a Judgment in *C. B.* in not ſevering for what part by number of Acres by Special Verdict, and giving entire Damages to the Plaintiff, 2 *Keb.* 250. *Mackworth* and *Thomaſin.*

Ejectione

Ejectione Firme was againſt Baron and Feme: On Not guilty pleaded, the Feme was found guilty, and the Baron Not guilty; and the Judgment was againſt Baron and Feme, *quod capiantur*. This was aſſigned for Error, but the Plaintiff had Judgment, for ſo are all the Preſidents: But in the Writ it was *vi & armis*, and in the Declaration *vi & armis* was left out; and for this cauſe Judgment was reverſed, *Cro. Car.* 406. *Mayo's* Caſe.

Verſus Baron and Feme *quod capiantur*, tho' the Baron be found Not guilty.

Vi & armis left out in the Declaration.

In *Ejectione Firme*, if Judgment be given upon Demur, or by Default, or on *Non ſum informat'* for the Plaintiff to recover the Term, but it's awarded that there ſhall be a Writ of Enquiry of Damages, without ſaying, *Quod capiatur*, this is erroneous; for it may be, he will never enquire of the Damages, and make Retorn of it; and then the Fine due upon the *Capiatur* will be loſt, 1 *Rolls Abr.* 769.

Writ of Enquiry of Damages, without ſaying, *Quod capiatur*.

Note, On Not guilty pleaded, Iſſue is joyned, and a Special Verdict found, and upon this Verdict Judgment given againſt the Plaintiff, and after the Plaintiff brings a Writ of Error, and in this the Judgment is reverſed, the Plaintiff ſhall have Judgment to recover his Term, his Declaration being good, and the Law being for him on the Special Verdict: For the Court which reverſeth the firſt Judgment, ought to give the ſame Judgment which was given in the firſt Suit, 1 *Rolls Abr.* 774. *Omalcowr* and *Eyres*.

Plaintiff brings a Writ of Error, and the Judgment is reverſed. What Judgment he ſhall have.

Note alſo, If before Judgment the Years of the Leaſe expire, the Plaintiff had Judgment

Before Judgment the Leaſe expires, the Plaintiff ſhall have Judgment for Damages.

ment to recover Damages; otherwiſe in Actions where Freehold is to be recovered, *Savile* 28.

In what Caſes Judgments ſhall be amended.

Twenty Acres entred for ten Acres.

The Jury find the Defendant guilty of Ten Acres, and the Judgment was entred of Twenty Acres, the Judgment was amended, *Winch. p.* 8.

Quod recuperet terminum left out.

If on *Non culp'* pleaded, a Verdict is for the Plaintiff, and Coſts and Damages given; and upon this the Judgment is, *Quod quer' recuperet* the Damages and Coſts, and not *quod recuperet terminum*, as the uſe is; this is the Default of the Clerk, and ſo amendable, 1 *Rolls Abr.* 206. *Belſh* and *Pate*.

Variance of Parcels.

Amendment.

The Clerk of the Entries of the Judgments had miſtaken the Parcels, the Jury having found ſeveral Ejectments in ſeveral Parcels, they find *S.* had ejected him out of certain Parcels by a certain Name, and *T.* had ejected him out of other Parcels by a certain Name, and miſtook that *S.* had ejected him out of the Parcels that *T.* had ejected him, having the *Diſtringas* for his Direction. But it was amended, for the Entry was, *quod recuperet verſus* S. *unum Meſſuagium*, &c. which was the Ejectment made by *T.* and ſo *vice verſa*; whereas the Court's Judgment was, *quod Judicium intretur pro Quer'*.

In *Ejectione Firme* of one Meſſuage, two Cottages, and certain Lands, and the Jury find the Defendant guilty of the Moiety of

a

a Meſſuage and Lands, and Not guilty of the two Cottages and of the other Moiety of the Meſſuage and Lands, and Judgment is, *quod Quer' recuperet Terminum ſuum prædict' de medietate tenementorum prædictorum, & eat inde ſine die* for the reſidue; and this Judgment, altho' it may be intended that Judgment is given for the Moiety of the two Cottages, whereof he is found Not guilty, in as much as it is *tenementorum prædictorum*, yet it ſhall be amended, it being only the Default of the Clerk, having the *Poſtea* before him when he entred the Judgment, 1 *Rolls Abr.* 206. *Sawyer* and *Hoskins*.

Default of the Clerk.

Judgment *quod recuperet*, and ſaith not *terminum*, yet amended, 1 *Keb.* 155.

The Judgment was, *quod recuperet* the Poſſeſſion of a Meſſuage, Sixty Acres of Land, Fifty Acres of Meadow, and Fifteen Acres of Paſture; whereas the Verdict was entred, That he was found guilty of the Ejectment of a Meſſuage, Ten Acres of Meadow and Thirteen Acres of Paſture, and for the reſidue, Not guilty; ſo as there is not any Land in the Verdict, and a leſſer Quantity of Meadow and Paſture than is in the Judgment, *per Curiam* it is amendable, and is not like the Entry of a *Capiatur* for a *miſericordia*, which is not amendable, that being an Error in point of Law, and cannot be imputed to the Default of the Clerk: But here the Verdict is the Guide to the Judgment; and when the Verdict is before the Clerk to enter up the Judgment, it is but his Miſpriſion, eſpecially the Entry of the Judgment in the Paper-book being right according

Amendment for Miſpriſion of the Clerk.

to

to the Verdict, *Cro. Jac.* 632. *Maſon* and *Stephenſon.*

EXECUTION.

Two Defendants, one conſeſſeth, the other pleads Not guilty.

In Ejectment againſt two, one conſeſſeth, the other pleads Not guilty, and at the Tryal the Plaintiff is Nonſuited, he cannot take Execution againſt him that conſeſſeth, but if by Rule of Court one be made Defendant for part and conſeſs, the Plaintiff notwithſtanding the Nonſuit, may take Judgment againſt him that conſeſſeth for his part; but if each Defendant take upon him the whole Title, the Plaintiff in any caſe cannot have Execution; but one Defendant being Leſſor of the Houſe, reſerving a Chamber, who never had any notice of the Action, and therefore Judgment entred of the whole Houſe, is not void *quoad* the Chamber only, but wholly. And *Hide* would have had the Attorney who entred Judgment, pay Coſts, but ordered Poſſeſſion to be delivered to the Tenant on Agreement to relinquiſh the Coſts, 1 *Keb.* 786. *Burgoigne* and *Thomas.*

Scire fac' upon Judgment in Ejectment may be brought by the Adminiſtrator of the Leſſee, or Leſſor himſelf.

It was a Queſtion much debated, If a *Scire fac' quare Executionem habere non debeat* upon a Judgment in *Ejectione Firme*, may be brought by the Adminiſtrator of the Leſſee (the Plaintiff in Ejectment, or by the Leſſor himſelf) againſt the Free Tenants; and *Per Cur'* the Leſſee or his Adminiſtrator, as well as the Leſſor himſelf ſhall have this Writ in ſuch a Caſe; this was on demurrer to the *Scire fac'*: Yet the Leſſee nor his Adminiſtator

niſtrator ſhall have it, but the Leſſor himſelf, *Sid.* 317. *Cole* and *Skinner.*

Recovery by the Husband in *Ejectione* of the Wife's Term.

Note, Baron and Feme are ejected out of a Term in the Right of the Wife, and the Husband recovers in *Ejectione Firme* brought by him in his own Name, this is an alteration of the Term, and veſts it in him only, 1 *Inſt.* 46.

After Judgment Court of Equity not to relieve the Mortgagor.

Note, It was adjudged in *Throgmorton* and Sir *Moyle Finch*'s Caſe, That after Judgment for the Mortgagee in Ejectment, a Court of Equity cannot relieve the Mortgagor; but he ought to have preferred his Bill before Judgment, 3 *Bulſtr.* 118. The Caſe was, He by whom the Money was ſent to be paid for the Redemption of the Land, was by the way robbed of the Money; but the Money was paid preſently after.

No Judgment upon *Nihil dicit*, but upon Motion in Court.

Note alſo, In *Ejectione Firme*, if a Rule is given to the Defendant to anſwer, and he doth not; and upon this another Rule is given to anſwer peremptorily, and he fails to do it, no Judgment ſhall be entred againſt him on a *Nihil dicit*, but upon Motion in Court.

It is ſaid in *Carter* and *Claypool*'s Caſe, 1 *Rolls Abr.* 887. If a Man recover in *Ejectione Firme* againſt *J. S.* who after dies, he muſt ſue Execution againſt his Heir; for by Intendment *J. S.* his Anceſtor the Ejector, was was a Diſſeiſor.

Of

Of Judgment againſt ones own Ejector.

Judgment againſt the caſual Ejector, Council prayed that he might not plead to the Declaration of *Michaelmas* Term on Leaſe of the Biſhop of *Worceſter*, made this *January Habend'* from the 20th of *October* laſt, which is ill, *per Cur'*, and Judgment ſtayed; but this is a good Declaration of this Term by new Delivery, tho' of Courſe a Declaration is of that Term always when the Tenant appears, which was but this Term, yet Judgment ſtayed, 3 *Keb.* 729. *Hill.* 18. *Car.* 2. *Finch* and *Pley.*

Declaration is of that Term when the Tenant appears.

The Action was of *Eaſter* Term, and the Demiſe and Title of the Plaintiff is but two days before *Trinity* Term, and there was a Rule for Judgment againſt the caſual Ejector; *per Cur'* this is but a Trick to gain Poſſeſſion, as Sir *Richard Mincham*'s Caſe was, who delivered Ejectments in his Wife's Life-time on Leaſe then when he had Title as of ſubſequent Term when ſhe was dead; and it is not fit to put the Tenant to a Writ of Error: So the Rule was ſet aſide, and ordered a new Declaration, 3 *Keb.* 343. *Tr.* 26 *Car.* 2. *Stedman*'s Caſe.

A Trick to gain poſſeſſion.

Judgment againſt ones own Ejector cannot be entred, till the *Poſtea* returned and indorſed, that the Nonſuit was for want of confeſſing Leaſe, Entry and Ouſter, which the Secondaries agreed for a Rule, 1 *Keb.* 246. Sir *Hugh Middleton*'s Caſe.

When Judgment againſt ones own Ejector to be entred.

Council

Council prayed Judgment againſt his own Ejector in an Action for Lands in the County Palatine of *Cheſter*, which the Court granted; becauſe when the Defendant hath pleaded to Iſſue, they may try it by *Mittimus* in the County Palatine, 2 *Keb.* 135. *Reddiſh* againſt *Smith.*

Judgment againſt ones own Ejector for Lands in *Com' Cheſter.*

R CHAP.

CHAP. XV.

Habere facias Poſſeſſionem.

1 *Keb.* 579.

How this Writ is to be executed. And when, and in what Caſes a new Habere facias Poſſeſſionem, *ſhall be granted or not. How the Sheriff is to deliver Poſſeſſion.* Habere facias Poſſeſſionem, *after the year without* Scire fac' *and why.*

By whom made out and when.

THis Writ is made out by the Clerk of the Judgments, after Coſts taxed and the Judgment ſigned.

In *Ejectione Firme* of 20 Acres of Land. The Defendant on Not guilty pleaded, is found Guilty for 10 Acres, and Not guilty for the Reſidue. Now the Plaintiff at his own peril, upon his own ſhewing which they are, ſhall be put in Poſſeſſion, *Savil p.* 28.

Plaintiff at his own Peril to be put in Poſſeſſion of the Acres found.

And if a Man bring *Ejectione Firme* of 40 Acres of Land, and recovers 30, and not the Reſidue. Upon the Writ of Execution the Sheriff may deliver to him any, (*viz.*) Three or more of the Acres in the name of the whole, without ſetting out the Land, recovered by Metes and Bounds; tho' the Plaintiff had not recovered all the Acres, whereof he brought the Action, and whereof he had ſuppoſed the Defendant Tenant, 1 *Rolls Abr.* 886.

How the Sheriff muſt deliver it.

Now,

Now, if a Writ of Execution go to the Sheriff, to put a Man in Poſſeſſion of 20 Acres of Land; the Sheriff ought to give him 20 Acres in quantity, according to the uſage of the Country, and not according to the uſage of the Statute. And if a Man recovers divers Meſſuages, the Sheriff upon the Writ of Execution (may make Execution of one in the name of all, without going to every one in particular, but (if in ſuch Caſe) the Meſſuages be in the Poſſeſſion of ſeveral Men, he ought to go to every Houſe particularly, and of them to deliver Seiſin, and the delivery of Seiſin of one, in the name of all is not ſufficient, *Floid* and *Bethel.*

How the Sheriff is to eſteem the Acres.

Where delivery of one Meſſuage in the name of all by the Sheriff is ſufficient or not.

When many Acres are in demand, and but part recovered, and the *Habere fac' Poſſeſſionem* comes to the Sheriff to deliver Execution of the Land recovered, it does not ſuffice there to give one Acre in the name of the whole recovered; but he ought to ſet forth all the Acres particularly, ſo that the Recoveror may have benefit of the Judgment in certainty, and the ſeveral profits without interruption, *Pal. Rep.* 289. *Molinex* and *Fulyam.*

Where the Sheriff is to give all the Acres in particular.

Sometime a Rule of Court is to give Poſſeſſion.

If one recover Rent or Common, a Writ Iſſues out to the Sheriff to put him in Poſſeſſion, and the Sheriff comes upon the Land, and delivers him Seiſin of the Rent or Common by parol, this is well done, 22 *Aſſ.* 84.

How the Sheriff is to give Poſſeſſion of Rent or Common.

Habere facias Poſſeſſionem, good without return.

Hab. fac' Poſſeſſion', if execute is good without return. But the Court may command the Sheriff to return it, 1 *Rolls Rep.* 77.

How Poſſeſſion to be given of Houſe, Land or Rent

Note, The Sheriff in Caſes where Land is recovered, is to put the party in Poſſeſſion and Seiſin by a Twig, Clod, *&c.* of an Houſe by the Key, *&c.* of Rent by Corn or Graſs growing on the Land, out of which the Rent Iſſues, 6 *Rep.* 52.

Habere fac. Poſſeſſionem how awarded into *Ireland.*

Error was of a Judgment in the *Kings Bench* in *Ireland*, and Judgment for the Defendant was reverſed, and Judgment given for the Plaintiff, *quod recuperet terminum ſuum præd.* It was moved how *Habere fac' poſſeſſionem* ſhould be awarded. And it was reſolved, That there ſhould be a Writ directed to the Chief Juſtice in *Ireland* to Reverſe that Judgment, commanding him to award Execution, *Cr. Car.* 511. *Mulcarry* and *Eyres.*

In what Caſes a new Habere fac' Poſſeſſionem *ſhall be granted or not, and of the Sheriffs demeanor therein.*

Where the Plaintiff ſhall have a new *Habere facias Poſſeſſionem.*

Nota pro Regula. That after *Habere fac' poſſeſſionem* executed, be it by the Sheriff or voluntary delivery of Poſſeſſion, if the Party be turned out again by the Defendants means, he may have a new *Habere fac' poſſeſſionem* on motion in Court, and an Attachment againſt him: But if after quiet Poſſeſſion others enter, he muſt have a new Action or Reſtitution; elſe by this means, by practice the Plaintiff may turn out any of

of his after Leſſees on Non-payment of Rent. Had actual poſſeſſion been by Agreement of the Parites, or by Delivery of the Sheriff, the Party can never after have a *Habere fac' poſſeſſionem*: But if there be agreement to deliver Poſſeſſion *in futuro*, if it be denied a new Writ may be had. But after the year there muſt be a new motion for it in Court: With this agrees *Pearſon* and *Tavernor*'s Caſe, if one recovers in Ejectment, upon which the Recoveror was put in Poſſeſſion *Per Habere fac' poſſeſſion*, and after the Defendant ouſts him again, if the Writ was never returned (becauſe then it appears not, that the Plaintiff was ever out of Poſſeſſion) a new Writ ſhall be granted, 1 *Keb.* 779. *Ratliff* and *Tate*, 1 *Keb.* 785. *Lovelace*'s Caſe, 1 *Rolls Rep.* 353. *Peirſon* and *Tavernor*'s Caſe.

It is expreſly reſolved in *Dame Molineux* and *Falgam*'s Caſe, *Palmer p.* 289.

When the Writ of *Hab. fac' Poſſeſſionem* is returned and filed the Court may not award a new *Habere fac' Poſſeſſionem*, and why.

If *Haber e facias poſſeſſionem* go to the Sheriff, and he returned Execution of the Writ, and the Writ is filed; there the Court may not award a new *Habere fac' poſſeſſionem*, but before they may, becauſe in the firſt caſe it appears the Party had Execution. The Council prayed, That the Defendant might file an *Habere facere poſſeſſionem* to the intent that no new one may be taken out, or that, that was taken out ſhould not be filed after the return of it, which the Court refuſed; for the Party hath election to return it or not, and may renew it at pleaſure, till an effectual Execution be had; albeit the Party had Execution, yet if there were any ſuddain expulſion of him,

he shall not be Estopt, 2 *Keb.* 245. *Underhil* and *Devereux.*

New *Habere facias Possessionem.*

Also, if the Sheriff give Seisin but of part, he may have new *Habere fac' possessionem* for the rest.

So in *Stile's* Case, 2 *Brownl.* 216. *Stiles* upon a Judgment in *Ejectione Firme*, was put into Possession by the Sheriff, by *Habere fac' possessionem*, and after the Defendants enter again, and the Writ was returned but not Filed. *Per Cur.* He may not have a new Writ of Execution, but is put to his new Action, and the Filing of the Writ is not material, for it is in the Election of the Sheriff, if he will return it, or not. But if Execution had not been fully made, as in case of persons hiding themselves in the upper Lofts, and after the Sheriff was gone, they outed those that were in Possession, in this Case a new Writ of Execution was awarded. But by the Chief Justice, if the Sheriff put a Man in Possession, and after the other which was put out enter forthwith; in this Case the Court may award an Attachment against him for contempt against the Court, and so an Attachment was awarded upon Affidavit in *Gallop's* Case, 2 *Brownl.* 253. To this purpose is *Upton* and *Well's* Case, 1 *Leon. p.* 145. Upon the *Habere fac' Possessionem*, the Shereiff returned that in the Execution of the said Writ, he took the Plaintiff with him, and came to the House recovered, and removed thereout a Woman and two Children, which were all the persons which upon diligent search he could find in the said House, and deli-

It is at the election of the Sheriff, whether he will return it or not.

Where the first Writ is not fully executed the Court will grant a new one.

delivered to the Plaintiff peaceable Poſſeſſion to his thinking, and afterwards departed and immediately after three other perſons, who were ſecretly lodged in the ſaid Houſe expulſed the Plaintiff again: Upon notice of which he returned again to the ſaid Houſe, to put the Plaintiff in free Poſſeſſion, but the others did reſiſt him, ſo as without peril of his Life, and of them that were with him in Company, he could not do it. And upon this return, the Court awarded a new Writ of Execution, for that the ſame was no Execution of the firſt Writ, and alſo awarded an Attachment againſt the Parties, 1 *Leon.* 145.

If the Sheriff delivers more Acres than are in the Writ, this makes not the Writ Erroneous, but Action on the Caſe lies againſt the Sheriff for doing it; but if the Writ of *Hab. fac. poſſeſſionem* contains more Acres of Land, than were in the Declaration, the Writ is Erroneus.

If the Sheriff delivers more Acres than are in the Writ.

Upon *Ejectione Firme*, and Judgment *Hab. fac. poſſeſſionem* ſhall be after the year without a *Scire fac.* as to the Damages; yet its not abſolutely requiſite, that there ſhould be any *Scire fac.* as to the Land; for if the party take Poſſeſſion of other Land than he ought, Treſpas lies, 1 *Sid.* 351. *Okey* and *Vicars. Scire fac'* is given in perſonal Action, *per Stat. W.* 2. where the remedy was after the year to commence a new Action on the ſame Judgment; which cannot be in this Caſe as to Land, tho' it may be as to Damages; on Judgment for Damages, Coſts or Debt, there muſt be a *Scire fac'*, for here

Where *Habere fac. poſſeſſion.* ſhall be after the year without *Scire fac.*

is a person certain charged; not so in *Hab. fac. possessionem*, 2 *Keb.* 307. *Mesme* Case; but the *Hab. fac. Possessionem*, shall not be granted an year after the Judgment without a motion in Court. And if it be once executed, tho' the parties are turned out presently by a trick, yet they may not have new *Hab. fac. possessionem* without motion of the Court, *Siderf. pag.* 224.

Not to be granted after the year, without a motion in Court.

Note, It was a Question in one *Hall's* Case, upon the Statute of Maintenance: A Man was out of Possession, and recovered in *Ejectione Firme*, and was put in Possession by *Habere fac. possessionem*, Whether he might sell presently, and adjudged he might, *God. b.* 450.

Upon the *Hab. fac. possessionem*, the Sheriff may break open the House to deliver Possession, 5 *Rep.* 91.

Return de Hab' fac' Possessionem cum *Fieri fac.*

Virtute istius brevis mihi direct' 24 die Maij anno infra scripto Habere feci infra nominat' H. H. Possessionem Termini sui infra scripti de Tenementis infra script' cum pertin ac etiam Fieri feci de Terris & Catallis infra nominat' W. W. 20 s. parcel damnor infra scripe & denarios illos haber coram Justiciarijs infra scripe ad diem & Locum infra contene ad reddend' prefat H. prout interius mihi precipitur,

Of

Of Miſdemeanors in Poſſeſſion.

In Ejectment Declarations were delivered, and on Verdict Evidence was found for the Plaintiff againſt ſome, and Judgment againſt the Caſual Ejector for others, in the whole 47 Houſes. Upon colour of *Hab. fac. poſſeſſionem*, the Sheriff turns out of Poſſeſſion theſe 47 Tenants, and 80 other Tenants alſo without any Proceſs or Plea againſt them, for the Execution of which Writ the Sheriff took of the Plaintiff 200*l.* for Fees. 1. The Court would not grant any Writ to ſuperſede this Execution againſt the 80, for if ſo then it ought to be *Quia erronicè*, and there was not any Error in the proceedings againſt them, becauſe there was no proceedings againſt them, but they may bring Treſpaſs againſt the Sheriff, and the Sheriff ſhall be indicted for Extortion; for they cannot take ſuch Fees in caſe of real Eſtate as perſonal, 2 *Sid.* 155. Sheriffs Fee.

There is a remarkable Caſe in *Siderf.* 254. the King againſt *Farr. Farr* being a Sollicitor, had obtained a Judgment againſt the Caſual Ejector, upon which he Sues *Hab. fac. poſſeſſionem*, and the Sheriffs Bayliffs enter the Houſe with him, and break the Door where the Goods were, and take the Woman to whom the Houſe and Goods belonged, and required of her Special Bayl, and for want of it brought her to *Newgate*; then *Farr* took the Goods which were of great value. And upon *Tryal* at the *Old-Bayly* it appeared,

That

That *Farr* did this with intent to take away the Goods, and had no colour of Title to the Houſe for his Client. He was found Guilty of Felony, and was hanged, not being able to Read tho' he were a Sollicitor.

The Court was moved for an Attachment againſt *J.* upon an Affidavit, that he had ejected one out of Poſſion that was put in by *Hab. fac. poſſeſſionem*, and that in a very Riotous manner, and had impriſoned the Party ſo put out of Poſſeſſion. The Council on the other ſide anſwered, That the party came into the Land by vertue of an Eigne Judgment, and an Extent upon it. *Rolls*, here is Title againſt Title, therefore take your Courſe in Law, for we make no Rule in it, *Stiles p.* 318. *Fortune* and *Johnſon*'s Caſe.

Verdict for the Plaintiff was found in Ejectment. But upon Agreement made between the Plaintiff and Defendant, The Defendant was to hold the Land recovered, for the remainder of his Term to come, and according to this Agreement he held it for two years; but afterwards before his Term expired, the Plaintiff takes out an *Hab. fac. poſſeſſionem* and executes it. It was moved, That the Defendant might have a Rule for Reſtitution. *Per Cur.* it cannot be: Take your Action on the Caſe againſt the Plaintiff, for not performing his Agreement, *Stiles Rep.* 408. *Wood* and *Markham*.

CHAP.

CHAP. XV.

Of Action for the mean Profits. In whose Name. What Evidence shall be given in this Action or not.

THE Action for the mean Profits on the Judgment in the Ejectment, shall be in the name of the Lessee during his Term. And *note*, In this Action no Evidence shall be given, as to the Right, which must be, if the Action should be in the Lessors name, and therefore he can have no such remedy, 1 *Keb.* 731. *Sadler* and *Taylor*. In whose name. What Evidence shall be given in this Action.

A Tryal at Bar was prayed in Action for mean Profits. But the Court denied it, because how good a Title soever the Defendant hath, he cannot give in Evidence any other matter than what was before Ruled. But by *Twisden* the Title being admitted, other matter may be given in Evidence, as a Release or Fine by the Plaintiff: And the same Law is in Action by the Lessor, in the former Action as by the Lessee, and against the Undertenant, or any that claim under the former Defendants Title, especially the contest being for profits during the time of the former Action hanging.

So it is said in *Harris* and *Wills*'s Case. If Recovery be in *Ejectione Firme*, and after Trespass is brought for the mean profits before the Lease, nothing shall be given in Evidence, but the value of the Profits and not the Title. For if it should be so, then long

long Tryals would be infinite. Alſo, if it be between the ſame Parties, the Record is an Eſtoppel; ſo the Court held it ſhould be, if it were againſt Undertenants. But the Court granted a Tryal at Bar, in aſſurance they would not inſiſt upon the Points formerly adjudged, but admit it, and inſiſt upon new Title, *Siderf. p.* 239. *Collingwood's* Caſe.

In 1 *Will.* and *Mary*, The Court was moved to ſet aſide a Verdict, recovered in an Action for the mean profits after Recovery in Ejectment, ſhewing that the Defendant in the Ejectment had brought another Ejectment ſince, and recovered; ſo that the firſt Recovery was diſaffirmed, and therefore there ought to have been no Recovery for the mean profits, but the motion was denied, *per tot. Cur.* 2 *Ventris Reports.*

Treſpaſs lies by Recoveror in Erroneous Judgment for a mean Treſpaſs; becauſe the Plaintiff in Writ of Eror recovers all mean profits, and the Law by fiction of Relation, will not make a wrongdoer diſpuniſhable, 13 *Rep.* 22. But *contra*, where Act of Parliament reſtores.

In Treſpaſs with *continuando* to recover mean profits, an Entry and Poſſeſſion of the Land before the Treſpaſs muſt be proved; and alſo, another Entry after the Treſpaſs. Leſſor is the principal Perſon lookt upon in the Law to Sue for the mean profits, 2 *Keb.* 794.

A Termor being Outlawed for Felony, granted his Term and Intereſt to the Plaintiff, who is put out by *J. S.* and after the Outlawry

Outlawry is reverſed; and the Plaintiff brought Treſpaſs for the profits taken between the Outlawry Reverſed and the Aſſignment; adjudged, that the Action did lie; for tho' during that time that the Queen had the Intereſt, and the Aſſignee had Right, yet by the reverſal it is as if no Outlawry had been, and there is no Record of it, *Cr. Eliz.* 270. *Ognell's* Caſe. It was held by Juſtice *Vernon*, where a Man would recover the mean profits in Treſpaſs, he muſt prove Entry into every parcel, and not into one part in the name of all. An Action of Treſpaſs came to Tryal before *T.* for recovering the mean profits, and the Treſpaſs was laid the 11 of *May* with a continuation, and the firſt Entry was before the 17 Day; And an Ejectment had been brought of this Land the ſame Aſſizes, and becauſe a ſecond Entry is required to recover the mean profits, the which if it ſhall be, will happen after that time which he hath acknowledged himſelf out of Poſſeſſion, by his Action of Ejectment, and ſuch Entry will abate the Action; it was directed to find Damages for the firſt entry only.

It is a Rule in Law: By the Re-entry of the Diſſeiſee, he is remitted to his firſt Poſſeſſion, and is as if he had never been out of Poſſeſſion; and then all who Occupied in the mean time, by what Title ſoever they come in, ſhall Anſwer to him for their time, as if a Diſſeiſor had been Diſſeiſed by another: The firſt Diſſeiſee Re-enters, he ſhall in Treſpaſs puniſh the laſt Diſſeiſor; otherwiſe, after his Re-entry he ſhould have

have no remedy for his mean profits.

Note, In Treſpaſs for mean profits Special Bail is always given, 1 *Keb.* 100.

Writ of Enquiry for mean profits how abates.

Writ of Enquiry for mean profits abates by Death after Judgment, and before or pendent Error, but after affirmed is in mitigation, *Warren* and *Orpwood*, 3 *Keb.* 205.

In whoſe name.

Where one Declares on a Fictitious Leaſe to *A.* for three years, and within the ſame Term Declares of another Fictitious Leaſe to *B.* of the ſame Lands; the laſt is not good for Treſpaſs for the mean profits muſt be brought in the firſt Leſſees name, *ut dicitur.*

Its a note in *Siderf. p.* 210. If one Recover and had Judgment in *Ejectione Firmæ*, according to the uſual practice, by confeſſing Leaſe, Entry and Ouſter, *&c.* it was a doubt by the Court, if upon ſuch Confeſſion, Leſſee may have Treſpaſs for the mean profits, from the time of the Entry confeſſed; for it ſeems it is an Eſtoppel, between the Parties to ſay, That he did not enter. *Tamen Quære*, becauſe this Confeſſion is taken to Special purpoſe only, *Siderf. p.* 210.

If a Writ of Error in Ejectment abates by the Act of God, a ſecond Writ ſhall be a *Superſedeas. Aliter*, where it abates by the Act of the Party, 1 *Vent.* 353.

Judgment in Ejectment. The Defendant (Plaintiff) brings a Writ of Error. The Plaintiff who is Defendant in the Writ of Error, brings a *Scire fac. Quare Executionem non.* To the intent the Defendant, Plaintiff

tiff in Error might assign Errors. To which the Plaintiff in Error pleads, That the Defendant ought not to have Execution, because he was in Possession already, by vertue of *Hab. fac. possessionem.* *Per Cur.* Its a trick for delay, The *Scire fac.* being only to the intent, that the Defendant may assign Errors, and there can be no such Plea to it in stay or delay of Execution, 1 *Keb.* 613. *Winchcomb's* Case.

CHAP.

CHAP. XVII.

Writ of Error.

Where it lies. Of what Error the Court ſhall take Coniſance without Diminution or Certificate. Variance between the Writ and Declaration. Variance between the Record and the Writ of Error. One Defendant dies after Iſſue and before Verdict. Non-age in Iſſue on Error where to be tried. Amendment of the Judgment before Certiorari *unaided. Releaſe of Errors from one of the Plaintiffs in the Writ of Error, bars only him that releaſed it, and why. Outlawry in one of the Plaintiff pleaded in Error. Of Releaſe of Errors by caſual Ejector.*

Where it lies.

ERror lies in *B. R.* upon a Judgment in Ejectment before the Juſtices in *Wales*, *per Stat.* 27 *H.* 8. Error in Real Actions ſhall be reverſed in *B. R.* and in perſonal Actions by Bill before the Preſident and Council of the Marches; and becauſe Ejectment was a mixt Action, there was ſome doubt, but it was reſolved, *ut ſupra*, *Moor p.* 248. *n.* 391.

Ejectment before Juſtices in *Wales.*

Writ of Error lies in the *Exchequer-Chamber* upon a Judgment in a *Scire fac'* in *Ejectione*, *Sid. Crook Car.* 286.

Leſſor or Leſſee may have a Writ of Error on Judgment in *Ejectione*, *Sid.* 317.

In

In a Writ of Error upon a Judgment in *Banco* in *Ejectione Firme*, is certified a brief Entry of the Writ according to the Course there, and then the Declaration at large, and by the Recital of the Writ which mentions that the Action is brought *de Rectoria de D. viginti Acris terræ & duodecim Acris prati cum pertinentiis in D.* And the Declaration is of a Lease by Indenture of the said Rectory and Tenements *cum pertinentiis (excepta terra pro mensa Vicarij ibidem cum omnibus talibus easiamentis quales Vicarius adtunc habuit cum omnibus talibus decimis*, &c.) And upon Not guilty a Verdict and Judgment was for the Plaintiff, and assigned now for Error, That Judgment was given *pro Querente*; whereas it ought to to be for the Defendant. And after *in nullo est erratum* pleaded, it was moved for Error, That it appears by the Record certified, that the Writ is general of a Rectory, and the Declaration is of a Rectory with certain Exceptions. In this Case the Court ought to reverse the Judgment for this Cause, in as much as this is not assigned for Error, nor the Writ it self certified; so that the Court may not take notice that the Writ is as the Entry of it is certified; and this Exception is but a Variance between the Writ and the Declaration, and perhaps this Exception in the Declaration was but *ex abundantia*, and is not parcel of the Rectory, and then he ought not to have demanded the Rectory with an Exception. And it seems it had not been a good Plea for the Defendant in the first Action, to say that it appears by the Declaration that there is an Exception, *&c.*

Of what Error the Court shall not take Conisance *sans Certificate.*

Variance between the Writ and Declaration.

Declaration with an Exception and pleading in such Case.

without Averment in Fact, that it is parcel of the Rectory, *Paſ.* 11 *Car. B. R. Gregory* and *Shepard* on a Leaſe made by the Dean and Chapter of *Peterborough*.

Error upon a Recovery in Ejectment out of the Court of *Durham*. The Error aſſigned was the Infancy of the Plaintiff in the Ejectment, who appeared by Attorney where he ought to have appeared by his Guardian; and upon Iſſue joyned on the Infancy, it was found for the Plaintiff in the Writ of Error. But this Writ of Error was not ſufficient to the Court to proceed to the Reverſal. 1. Becauſe the Writ of Error is directed to the Biſhop of *Durham* and others by Name to remove a Record of Ejectment between ſuch and ſuch, which was *coram* the ſaid Biſhop and ſeven others by Name, and the Record removed, ſeems to be a Record of Ejectment before the Biſhop and eight others, ſo it is not the ſame Record ſpecified in the Writ; for a Record before eight, and a Record before ſeven cannot be intended the ſame Record. 2. This Writ of Error is directed to the Biſhop of *Durham* and ſix others by Name, and the Retorn of the Writ (*viz.*) *Reſpons'* of the Commiſſioners is by the Biſhop and five others only, without making mention of the ſixth Commiſſioner, *Yelv. p.* 211. *Ode* and *Moreton.* 2 *Rolls Abr.* 604.

Variance between the Record and the Writ of Error.

In Ejectment Verdict was given *pro Quer' quoad ill' parcel' Meſſuagij prædict' jacen' proxim' ad Meſſuag' modo* F. N. *continen' ex Boreal' parte*, &c. *& quoad reſid' pro Def.* and the Judgment was, *quod Quer' recuperet terminum ſuum prædict' de* C. *in prædict' parcel' præ-*

prædicti Meſſuagij jacen' proxim' ad prædict' Meſſuag' ut præfertur in occupatione prædicta F. N. *& continen'*; whether this Variance between the Verdict and Judgment be Error, *Adjournat' Qu.* if it be not a Jeofayl *deins Art. Stat.* 16, 17 *Car'* 2. *c.* 8. *Raym. p.* 398. *Norris* and *Bayfeild.*

Ejectione Firme againſt two, if after Iſſue joyned, and *Venire fac'* awarded, one of the Defendants dies; and after a Verdict is given at the *Niſi prius* for the Plaintiff, and after before Judgment the Plaintiff ſurmiſeth the Death of the one, *ut ſupra*, and prays Judgment againſt the other, and Judgment given accordingly without any Anſwer to it by the Plaintiff, if it be not true that he is dead, as was ſurmiſed, this may be aſſigned for Error; for in as much as the Plaintiff had made this Surmiſe, it being a matter of Fact, and the Plaintiff might not have any Anſwer to it (the uſe not being to enter up this, that the Plaintiff does not deny it) the Plaintiff had no other Remedy but to aſſign this for Error. But this is reported otherwiſe, *p.* 767. 1 *Rolls Abr.* 756. *Tiffin* and *Lenton.*

Death of one Defendant dying after Iſſue pleaded, and before Verdict.

If *A.* bring *Ejectione Firme* againſt *B.* and *C.* and after Iſſue joyned *B.* dies, and after upon the *Hab. Corpora*, which mentions the Iſſue to be between *A.* of the one part, and the ſaid *B.* and *C.* a Verdict is given againſt *B.* and *C.* that they are guilty, and Damages againſt them; but a Surmiſe is made of this before Judgment, and ſo Judgment given only againſt *C.* this is not erroneous, altho' the Verdict was againſt both, in as much as

the Judgment was only againſt him who was in life, 1 *Rolls Abr.* 767. *Tiffin* and *Lenton.*

Nonage in Iſſue upon Error, where to be tried.

If *A.* recover againſt *B.* in *Ejectione Firmæ* in *D.* upon which *B.* brought a Writ of Error in *B. R.* at *Weſtminſter* and diſcontinues it, and after there brought a new Writ of Error, *quod coram vobis reſidet*, and aſſigns for Error, That the ſaid *A.* at the time of the Tryal of the firſt Action was *commorans* and within Age, at *Weſtminſter* in *Middleſex*, and that he ſued in the ſaid Action by Attorney; and upon the Nonage the Parties are at Iſſue; this ſhall be tried in *Weſtminſter*, and not in *D.* where the Land lies, becauſe the *Ejectione Firmæ* is not any real Action; and in as much as it is ſpecially alledged that he was within Age and *commorans* at *VVeſtminſter* when the Writ of Error was brought, 2 *Rolls Abr. p.* 604. *Orde* and *Moreton.*

Deint Age.

Error of a Judgment in *Ireland* in *Ejectment* was aſſigned, that the Plaintiff then Defendant was *per Attornat'*, and within Age, Judgment was reverſed notwithſtanding 17 *Car.* 2. *c.* 8. *vide* 3 *Keb.* 384. *D.* of *Albermarl* and *Keneday.*

Fair by Releaſe.

In Ejectment one of the Defendants pleaded Not guilty, and Verdict for the Plaintiff againſt both, and Judgment *accordant.* Error was brought, becauſe in the *Venire Conſtantinus Callard* was retorned, and ſo named in the *Diſtringas*; but in the Pannel annexed thereto *Conſtantius Callard* was retorned and ſworn, and ſo was retorned by that name on the back of the *Poſtea*; this was held manifeſt Error; for they be diſtinct Names

Names of Baptiſm, and cannot be amended; but *Curia adviſare* from *Hillary* Term till *Paſche*; in the mean time the Defendant in the Writ of Error obtained a Releaſe of all Errors from one of the Plaintiffs in the Writ of Error, and the firſt day of *Term Paſch.* pleaded it in Bar as a Plea *puis darrein Continuance*; and thereupon a Demurer was entred in the Names of both the Plaintiffs in the Writ of Error; for *in nullo eſt erratum* being pleaded before, there could not now be any Summons and Severance. *Per Curiam* this Releaſe ſhall bar him only that releaſed it, and not the other Plaintiff (though the Action was in the perſonalty:) For the Plea being by way of Action, to diſcharge themſelves of Damages which were recovered againſt them, and to be reſtored to the poſſeſſion which was loſt by the firſt Judgment; and they being joyned in the firſt Action by the Act of the Plaintiff, and their own voluntary Act, it is not reaſon that the Act of one ſhall charge or prejudice the other. But otherwiſe if they had been Plaintiffs in the Record by their own Act, *Cro. Jac.* 116. *Blewit* and *Sneadſtow.*

Releaſe from one of the Plaintiffs in Error, ſhall bar only him that releaſed it, and why.

Verdict was *pro Quer'* for 10 Meſſuages, 15 Acres of Land, 15 Acres of Meadow and 20 Acres of Paſture, and as to the Reſidue *Non Culp.* And the Judgment was, That the Plaintiff ſhould recover the Meſſuages and the greater Quantity of Acres which were in the Verdict. Upon which the Plaintiff brought a Writ of Error, and aſſigned Errors, and had a *Scire fac.* and before the Defendant in the Writ of Error joyned *in*

nullo est erratum, it was moved in Common Bench for amendment of the Judgment. It was objected. 1. That the time after the Assignment of the Error was past for the amendment. *Per Cur.* The time is not past, so long as a Diminution may be alledged, or a *Certiorari* awarded, it may be amended. 2. The Judgment is the Act of the Court, and therefore may not be amended. *Per Cur.* It is the default of the Clerk, who did not enter the Judgment according to the Verdict, *Jones Rep. p.* 9.

Amendment of the Judgment before a *Certiorari* awarded in Error.

Ejectione Firme by two against one Defendant. And on Not guilty, Verdict for the Plaintiff. The Error assigned was, because *Constantinus Callard* was returned, and so named in the *Distringas*, but in the Pannel annext thereto by the Sheriff, *Constantius Callard* was Returned and Sworn, and so was returned by that name on the back of the *Postea*. Its manifest Error; for they be distinct names of Baptism, and not amendable. But *Curia advisare*. In the mean time the Defendant in the Writ of Error obtained a Release of all Errors from one of the Plaintiffs in the Writ of Error. And the first day of *Easter* Term pleaded it in Bar as a Plea *puis darraine* Continuance; and thereon a Demur entred in the name of both the Plaintiffs in the Writ of Error. For in *nullo est erratum* being pleaded before, there could not be any Summons and Severance. *Per Cur.* This Release shall bar only him that Released it, for the Plea being by way of Action to discharge themselves of Damages, which were recovered against them,

Release of Errors from one of the Plaintiffs in the Writ of Error pleaded, shall bar only him that Released it, and why.

Ejectment against the Release of one shall not bar the other of a Writ of Error, because this is to recover nothing, but to have restitution of that which he lost by the Judgment.

them, and to be reſtored to the Poſſeſſion which was loſt by the firſt Judgment; and they being joyned in the firſt Action, by the Act of the Plaintiff, and not by their own voluntary Act, it is not Reaſon, that the Act of one ſhould charge or prejudice the other, for then by ſuch practice any one might be charged, and ſhould have no remedy to diſcharge himſelf. And the Judgment was reverſed, *quoad* him that did not Releaſe, and that he ſhould be reſtored to all what he loſt, and *quoad* the other who releaſed, that he ſhould be barred in his Writ of Error, *Cro. Jac.* 116. *Blunt* and *Snedſtow*, 2 *Rolls Ab.* 411. *Meſme* Caſe.

Outlawry in one of the Plaintiffs pleaded in Error.

So the Defendant in the Writ of Error Pleads Outlawry in one of the Plaintiffs. *Per Cur.* Its no Bar, becauſe this is an Action not to recover any thing, but to reſtore them to what they had loſt, and to diſcharge them of Damages and Fines; and they are forced to joyn, becauſe one of the Plaintiffs was a Defendant in the former Action, *Cro. Jac.* 616. *Bythell* and *Harris.*

Error without Bail, a *ſuperſedeas.* 13 Car. 2. c. 2.

Error without Bail is a *Superſedeas* in Ejectment, notwithſtanding the Act of 13 *Car.* 2. *c.* 2. being not within the general word Treſpaſs, 1 *Keb.* 308. *Lufton*'s Caſe.

And unleſs all the Defendants in Ejectment do give Recognizance, its no *Superſedeas*, for as to the Land its intire, 3 *Keb.* 138. *Cole* and *Levingſtone.*

Baron and Feme Leſſors. its no Error to alledge the the death of the Wife before Judgment.

Baron ſeiſed in the Right of the Feme, makes an Ejectment Leaſe, and the Leſſee brings an Action upon it, and hath a Verdict and Judgment; its not Error to alledge the

death of the Wife before Judgment, by which the interest of the Husband, and Lease by him made to the Plaintiff determines, because neither the Wife nor the Husband are Parties to the Action, and this determins upon the Title to the Land; for the Plaintiff may say, That the Husband was seised in his own right, 1 *Rolls Abr.* 768. *Wilks* and *Jordan.*

The Plaintiff in Ejectment dead before Judgment.

Error was brought to Reverse a Judgment in *Ejectione Firme*, and Error in Fact assigned, (*viz.*) That the Plaintiff in the Ejectment was dead before Judgment: To which he that was Attorney for the Plaintiff pleaded, That he was alive at such a place, and upon this Issue joyned, and found that he was dead. *Per Cur.* The Issue is well joyned, and the Judgment shall be reversed for this Error without *Scire fac.* against the Executors, for until the Issue tried none can deny, but that the appearance was good. But the surer way had been for the Attorney to have pleaded *quod venit pro magistro suo D.* and not *qd. D. venit per Attornat. Siderf. p.* 93. *Dove* and *Darcen.*

The Plaintiff dies between Verdict and Judgment, the Judgment is voidable by Error.

If a Man recover in *Ejectione Firme*, and after his Executor Sues Execution by *Scire fac'* against the Recoveree; the Recoveree may not avoid the Judgment, nor stay Execution by saying, That the Plaintiff died between the Verdict and Judgment, or such like. But he is put to his Writ of Error, for the Judgment is only voidable, 1 *Rolls Abr.* 742. *Hide* and *Markham.*

But

But in 1 *Rolls Abr.* 768. If a Man brings *Ejectione Firme* in *B. R.* and there he hath a Verdict on Tryal at the Bar, and after, and before Judgment he dies, and after Judgment is given againſt him the ſame Term. This is not Error, becauſe the Judgment relates to the Verdict, *Hide* and *Mark*'s Caſe.

The Plaintiff dies after Trial Judgment may be given.

Leſſor of the Plaintiff in Ejectment, may have a Writ of Error upon a Judgment in *Ejectione Firme*, *Sidorf.* 317. *Cole*'s Caſe.

Leſſor of the Plaintiff may have a Writ of Error.

Releaſe of Error, vid. ſupra.

The Iſſue was that *H.* who was caſual Ejector, and gave Releaſe of Errors, was not the ſame Perſon. Being tried, The Court would not ſuffer the Defendant to Aſſign Error, but conceived he was barred now, 1 *Keb.* 755. *Keyes* and *Bredon.*

The Defendant obtains a Releaſe of his caſual Ejector, and pleads it to a Writ of Error, of a Judgment by default, of Ejectment in *Ireland*; altho' the Iſſue was, that he that made the Releaſe was not the ſame Perſon as was caſual Ejector. Yet *per Cur.* It ought to be ſet aſide, and the Error Aſſigned, 1 *Keb.* 705. *vid.* 7.

Iſſue that he that made the Releaſe was not the ſame perſon.

Releaſe

Releaſe by Caſual Ejector is a fraud.

Releaſe by Caſual Ejector, a fraud.

The Court conceived a Releaſe of Errors, obtained of the Caſual Ejector by the Leſſor being but Fictitious is void. And the Court made a Rule, That no ſuch Releaſe be accepted without Leave of the Court, 1 *Keb.* 740. *Keys* and *Bredon.*

The Caſe was, As it is Reported in *Raymond*, 93, *Keyes* and *Bredon.* The Plaintiff obtains a Judgment againſt his own Ejector, in a Caſe where an Infant was in Poſſeſſion; and the Party concerned in the Lands, brings a Writ of Error in the name of the feigned Defendant. The Plaintiff in the Writ Pleads the Releaſe of the Defendant. *Per Cur.* Such Releaſe ſhall not be allowed. And the Court will not permit the Party to proceed to try the Iſſue, if the Releaſe be good or not, becauſe it is to Bar the Right of a third perſon.

Releaſe by Caſual Ejector, a fraud.

Ejector diſavows the Suit.

On Ejectment after Judgment againſt Caſual Ejector, for not confeſſing Leaſe, Entry and Ouſter; the Defendant in the Ejector's name brought a Writ of Error, and now the Ejector was brought to the Clerk of the Errors, and diſavowed the Suit, and thereupon it was prayed by Council, that a *non Proſ.* may be entred, as is the uſual Courſe in ſuch Caſe, 2 *Keb.* 579. *M.* 21. *Car.* 2. *VVats* and *Loyd.*

In the Lord *Byron* and Sir *VVilliam Juxon's* Caſe, Council prayed leave to diſcontinue a Writ of Error brought in the Ejector's name,

name, of Judgment in the County Palatine of *Lancaſter* againſt him by default, ſhewing a Releaſe of Errors by the Caſual Ejector: But the Court denied it, but left them to Non-ſuit the Plaintiff in Error, 2 *Keb.* 853.

A Releaſe of Error by the Caſual Ejector, no Diſcontinuance in Error, 2 *Keb.* 853.

Ejectment was brought againſt eight Defendants in *B. C.* Error was brought, grounded upon the Judgment, and the Writ was *ad grave damnum ipſorum*, and the Judgment was only againſt three, and other five were acquitted, The Error was aſſigned in the Non-age of the three. *Per Cur.* The Writ of Error was good, tho' it might be alſo *ad damnum* of thoſe convicted. But being only in the nature of a Commiſſion, whereby the King Commands the Errors to be examined; this matter is not material, *Hob.* 70. *Yelv.* 209. By *Twiſden*, The conſtant practice is for all to joyn, and *per tot. Cur.* Judgment ought to be reverſed againſt all. Error of a Judgment in *Ejectione Firmæ*, and in the Record a ſpace was left to inſert the Coſts which had not been taxed, if ſuch an imperfect Record be certified; yet it might be amended by Rule of Court there, and then if it be removed by Error, the Court there muſt amend it. For it is the conſtant practice, That if a Record be removed into the *King's Bench*, out of the Court of *Common Pleas* by Writ of Error, and afterwards amended by Rule of Court in the *Common Pleas*, The Court of *King's Bench* muſt amend,

mend it accordingly, *vid. Hard. p.* 905. 1 *Ventr:* 165. *Bell* and *Richards.*

Ejectment was brought in *C. B.* in *Ireland*, and declares againſt *Commyn de Caſtrovilla & Terris de Kilborough*, in ſuch a County. The Plaintiff had Verdict and Judgment. *Commyn* brought a Writ of Error in *B. R.* in *Ireland*, and Aſſigns for Error, the want of an Oiginal. The Plaintiff rejoyns, that ſuch a Day an Original Writ was delivered to ſuch a one, and concludes to the Country. And the Judgment was reverſed there for want of an Original, on which the Plaintiff brought a Writ of Error for reverſal in *B. R.* in *England.* And the Judgment given in *B. R.* in *Ireland* was reverſed here, for the matter was diſcontinued. Becauſe the Defendant in *Ireland* concludes *al pais*, where in truth the matter of his Plea ſhould be tried by the Record, and the Plaintiff in Error doth not Reply, or Demurr upon the Plea of the Defendant, and ſo all is diſcontinued. Alſo, there was another apparent Error in the Declaration, *viz.* the Action brought *de caſtro villa & terris* in *Kilborough*, without expreſſing the number and certainty of Acres, and upon ſuch general demand no *Habere fac' Poſſeſſionem* can be awarded and executed, *Yelv.* 117. St. *John verſ. Commyn.*

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Ex. G. M.
11/22/12.